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REPORTS[#]_C
OF
C A S E S
ARGUED AND DETERMINED
IN THE
New York
Supreme Court of Judicature,
AND IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS
AND
THE CORRECTION OF ERRORS,
IN THE
STATE OF NEW-YORK.

BY WILLIAM JOHNSON,
COUNSELLOR AT LAW.

VOL. IV.

Third Edition, with additional Notes and References.

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1853.

DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, That on the thirtieth day of December, in the thirty-fourth year of the Independence of the United States of America, **WILLIAM JOHNSON**, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words following, to wit :

“ Reports of Cases argued and determined in the Supreme Court of Judicature, and in the Court for the Trial of Impeachments and the Correction of Errors, in the State of New-York. By William Johnson, Counsellor at Law. Vol. IV.”

In conformity to the act of the Congress of the United States, entitled, “ An Act for the encouragement of learning by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;” and also to an act, entitled, “ An Act supplementary to an act, entitled, An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.”

CHARLES CLINTON,
Clerk of the District of New-York.

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MATTHIAS B. HILDRETH.

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CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN FEBRUARY TERM, IN THE THIRTY-THIRD YEAR OF OUR
INDEPENDENCE.

PITCHER *against* LIVINGSTON.

THIS was an action of *covenant*. The declaration contained two counts; the first was for a breach of the covenant of *seisin*, the second for a breach of the covenant for *quiet enjoyment*, contained in a deed from the defendant to the plaintiff, dated the 17th June, 1801, for certain lands in *Queensbury*, in the county of *Washington*. The cause was tried at the *Washington* circuit, before Mr. Justice *Thompson*, and a verdict taken for the plaintiff, for 2,521 dollars and 75 cents. The covenants were proved to have been broken, and two questions were raised at the trial; 1. Whether the plaintiff was entitled to recover interest on the consideration money;

2. Whether he was entitled to recover damages for the *improvements* made by the plaintiff, and for the increased value of the land.

The judge was in favor of the plaintiff on the first question; but gave no opinion on the second. It was agreed, that a verdict should be taken for the plaintiff; and, if the court should be of opinion that the plaintiff was not entitled to interest, that then the sum of 183 dollars and 75 cents should be deducted from the amount of the verdict; and that, if the court should be of opinion that the plaintiff was not entitled to recover for the *improvements*, then the further sum of 925 dollars should be deducted from the verdict; and, if the court should be of opinion that the plaintiff was not entitled to

In an action for breach of the covenant of *seisin* and for *quiet enjoyment* in a deed, the plaintiff can recover only the consideration money paid, with interest, and the costs in ejectment. He

[* 2]
cannot recover damages for the *improvements* he has made, nor for the increased value of the land.†

† See *Wagar v. Schuyler*, 1 *Wend. Rep.* 553. 7 *Cov. Rep.* 41. *Bennet v. Jenkins*, 13 *Johns. Rep.* 50.

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recover any thing for the *increased value* of the land, that then the further sum of 750 dollars should be deducted from the verdict.

Foot, for the plaintiff. I shall contend that the plaintiff is entitled to recover the improved value of the land at the time of eviction. In the case of *Staats v. The Executors of Ten Eyck*, (3 *Caines*, 111. See also 2 *Mass. Rep.* 433. and 4 *Dallas*, 441. *Bender v. Fromberger*.) this point was not decided, but still remains open for discussion.

[THOMPSON, J. In that case, the court decided, that the plaintiff could not recover the *increased value of the land*. Nothing, however, was said as to the *improvements* made by the purchaser.]

The action of covenant, and a writ of *warrantia chartæ*, are different. The latter had reference to the time of the warranty made, and the compensation consisted in giving to the feoffor, lands of the warrantor, equal in value to those from which the feoffee was evicted. Where the feoffee could have the benefit of the writ of *warrantia chartæ*, no action of covenant would lie. (*Comyn, Cor. A.* 4.) The covenant of seisin and for quiet enjoyment are distinct: the one relates to the title; the other to the possession. For a breach of the former, the proper measure of damages is the consideration or value expressed in the deed; but, in regard to the latter, the covenant cannot be said to be broken, until the grantee is evicted, and the damage which he sustains is the value of the property at the time he is turned out of possession.

In the case of *Staats v. The Executors of Ten Eyck*, the plaintiff was allowed to recover, in addition to the money paid, the interest, and costs of defending the action of ejectment, including counsel fees. Beneficial improvements arise from the money laid out on the land by the purchaser; and he is as justly entitled to recover for money so laid out, as for money paid to counsel for defending the action. The increased value of the farm will also arise from the labor and agricultural improvements of the grantee. The labor bestowed by him is equivalent to money laid out on the property in any other way. By compensating him for the money he has expended, in proper, reasonable, and substantial meliorations, he will receive nothing for any fanciful or ornamental improvements, or for any extraordinary rise in the value of the land.

A court of chancery will compel the specific performance of a covenant or agreement so as to render complete justice to the party; and, by analogy, a court of law ought to render the same justice, by compensating the party in damages for the non-performance of the covenant. In the case of *Taylor v. Debar*, (1 *Ch. Ca.* 274. 2 *Ch. Ca.* 212.) where there was

a covenant for further assurance, the vendor having sold a bad title, he was decreed to convey a good title, which he, afterwards, had acquired, by the payment of a sum of money, from the king.

The covenant for quiet enjoyment was not broken until the eviction, and the true rule of damages is the value of the thing at the time the contract is broken.

Slosson, contra. The plaintiff, in this case, claims, besides the consideration money, the interest, compensation for the improvements, and the increased value of the land. The question is of great importance to the community, and *it was thought to have been settled by the case of *Staats v. The Executors of Ten Eyck*. I shall endeavor to show, from authority and reason, that the true and only measure of damages is the consideration money.

It is not pretended that there was any fraud or concealment on the part of the vendor. If there had been, the vendee might bring an action on the case, in the nature of an action of deceit. (*Cruise*, tit. 38. c. 5. s. 57. 1 *Inst.* 384. a. n. 1. 2 *Caines*, 193.) In an action of covenant, the plaintiff cannot recover damages for a deceit.

The covenant of seisin extends to the whole title, and is paramount to the other covenant, for, if the title fails, the possession will be lost also. The covenant of seisin draws after it the covenant for quiet enjoyment. *Omne majus continet in se minus*. The covenant must be construed according to the state of things at the time it was made. The grantor covenants that he is seised of the land then sold, and that the grantee shall enjoy it as then conveyed. The parties agree on the value of the land at the time, and the covenant extends to the value, as well as to the subject matter, at the time of sale. The subsequent alterations or improvements which the grantee may think proper to make, form no part of the subject matter of the contract. The covenant cannot extend to the houses and fences he may erect, or to the dykes and ditches which he may make on the land. If a slave has been sold for a certain price, and after the vendee has clothed him in a sumptuous livery, the true owner should reclaim and take the slave, can the vendee recover any thing for the livery? The subsequent additions or improvements form no part of the subject of the contract of sale.

In *Davenport v. The Bishop of Sarum*, (2 *Lev.* 68. S. C. 1 *Vent.* 223, 224. *Bac. Abr. Cov. F.*) a covenant to pay all taxes during the term, was held not to extend to any new tax created by parliament, but to such taxes only as were then in use; yet this covenant was prospective.

In *Speake v. Speake*, (1 *Vern.* 217.) where the husband covenanted that the lands settled as a jointure, were of a specific value, and the court decreed that the covenant should be per-

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formed *in specie*, the value of the lands was estimated as they were at *the time of the settlement, and not according to their value at the time of the decree.

In *Berty v. Dermor*, (12 *Mod.* 526.) Lord *Holt* says that if lands, to the value of £100 a year be devised to another. "the best rule of valuation is to estimate them at the value they were at the time of the death of the devisor."

Where a man made a feoffment in fee, to hold on the service of paying, at a certain time, the value of the annual profits of the land, the court held, that the value should be intended to be the value at the time the feoffment was made, and not as it was improved by succession of time. (2 *Leo.* 147. 3 *Leo.* 114.) This was a covenant in regard to annual profits, and several hundred years had intervened between the time of the feoffment and that of bringing the action, and the annual value had greatly increased. The court very properly looked to the state of things at the time of the feoffment, without regarding any subsequent fluctuations in the value.

The ancient distinction between a covenant and a writ of *warrantia chartæ*, arose from the little value of money at that time compared with land, and when money was regarded as no equivalent for land. It cannot apply at the present day, when real estate is less respected, and the party is allowed a compensation in money. In case of a warranty, the tenant was to receive lands of the warrantor equal in value at the time the warranty was made. (*Glanv.* lib. 3. c. 4. *Fleta*, lib. 6. c. 23. s. 2.) And where he had no lands in the same county, an extent issued to ascertain the value. (*Fleta*, lib. 6. c. 23. s. 3, 4.) The point was expressly decided in the *Year-Book*, 30 *Ed.* III. 14 *b.* that where a person enters into a general warranty, he shall recover in value, according to the value at the time he entered into the warranty. (2 *Roll. Abr.* 772. (T) 773. (U) 19 *Hen.* VI. 46. 61.) The same principle was recognized in *Humphreys v. Knight*. (*Cro. Car.* 456.) It is also to be found in 6 *Ed.* II. 187.; and the decision is commented upon by Mr. Justice *Livingston*, in giving his opinion in *Staats v. Ten Eyck*, and such has been the uniform rule in *England* since the reign of *Henry II.*

[* 6]

If any one ought to pay for the increased value of the land, or the improvements, it should be the person who *recovers the possession, for he alone is benefited. The covenantor, who has acted innocently and *bona fide*, ought not to be made liable beyond the consideration money, or the value at the time of the conveyance. Any argument derived from the hardship of the case, is as strong in favor of the grantor as the grantee. If all improvements are to be paid for, there can be no certain measure of damages, nor any limitation as

to the extent. The rule of the civil law, which limited the recovery to double the value of the land, was manifestly arbitrary and unjust. To adopt any other rule than the one taken by the court in the case of *Staats v. Ten Eyck*, would prove ruinous in the extreme.

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VAN NESS, J. Although it is not expressly stated in the case, I shall assume the fact to be, that the declaration contains an averment that the plaintiff had been evicted, in consequence of a total failure of the title derived to him under the deed from the defendant. This fact being assumed, there is no difference between the present case and that of *Staats v. The Executors of Ten Eyck*, (3 *Caines*, 111.) except that, in this case, beneficial improvements have been made by the plaintiff upon the property, the value of which he contends he is entitled to recover. The case just mentioned is among the most important and interesting of any that have ever been brought before this court for decision; and, accordingly, it appears to have received the most deliberate consideration. I not only submit to the authority of that case, but I take this occasion to express my perfect acquiescence in the reasons upon which the determination of it appears to have proceeded. The covenants upon which the breaches were assigned in that case, were the same as in the present, viz. the covenant of seisin, and for quiet enjoyment. The court decided, that the damages, which the plaintiff was entitled to recover, were to be limited to the consideration expressed in the deed, with the interest thereon, and the costs of suit attending the eviction. But in addition to the sum which the plaintiff, according to this rule, would recover, he contends that the defendant is bound to indemnify him for the loss of his improvements. These are estimated at 925 dollars; and the only point left open to discussion, is, whether he has a legal right to demand this sum.

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In *Staats v. The Executors of Ten Eyck*, the court determined that the plaintiff was not entitled to recover any damages on account of any increased value of the land. Here a distinction is attempted to be made between an appreciation of the land itself, and that appreciation of it which is produced by the erection of buildings, or the labor bestowed upon it in clearing and cultivating: a very nice, and, as I apprehend, a speculative distinction, to which it would be difficult, if not, in most cases, impossible, to give any practical effect, without danger of the most flagrant injustice. The reasoning of the judges, whose opinions are reported in the case alluded to, goes very far, if not conclusively, to prove, that such a distinction is utterly without foundation.* The admission that it might possibly exist, has probably given rise to this action, which, otherwise, I believe, would not, after that decision, have been brought. One, and perhaps the principal

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reason, why the increased value of the land itself cannot be recovered, is because the covenant cannot be construed to extend to any thing beyond the subject matter of it, that is, the land, and not to the increased value of it, subsequently arising from causes not existing when the covenant was entered into. For the same reason, the covenantor ought not to recover for the improvements; for these are no more the subject matter of the contract between the parties, than the increased value of the land. The doctrine contended for by the plaintiff's counsel is, that the damages sustained by the covenantee at the time of the eviction, ought to be the measure of compensation. Most clearly, then, the increased value of the land is as much within the reason of this rule as the improvements; and upon the same principle that the covenantee is entitled to the one, he is to the other.

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*But if the value at the time of eviction is to be the measure of damages, upon what principle is the consideration and interest, as such, recoverable in addition to the improvements? These must be laid out of view; and the then value be ascertained without reference to them. Besides, if, in determining the rule of damages, the *increase* of value is to be taken into view, by parity of reasoning, it would be proper, and what would be required by a just reciprocity, to take into consideration any contingent *diminution* of value. (*Ersk. Inst.* 206.) But this has never been heard of, nor pretended. No such principle is to be found in the common law, notwithstanding these covenants have been in use upwards of two hundred years. I think this circumstance affords an argument against the measure of damages insisted upon by the plaintiff, and which, of itself, is nearly decisive, that the rule is without legal foundation.

In illustration of my opinion on this part of the argument, I will state a case. A. gives a conveyance, containing covenants of seisin and for quiet enjoyment, of a house and lot. The house constitutes two thirds of the whole value. The house is afterwards burnt. Then the grantee is evicted for a failure of the grantor's title. He then resorts to both his covenants, which, of course, are broken, for indemnity. What would be the measure of damages? the value of the lot at the time of eviction, being one third of what the whole cost him; or the value, as ascertained and agreed upon by the deed itself? No doubt, the latter. Whenever the grantee's title has proved to be entirely defective, and there is an eviction consequent thereon, the grantee has a right to rescind the contract, and then, as in other cases depending on the same principle, he recovers back, upon his covenants, what he has paid, with the interest. (1 *H. Bl.* 17. *Fielden v. Star-kin.* 2 *W. Bl.* 1078. *Flureau v. Thornhill.*)

In the case just put, I have supposed, that both the covenants of seisin and for quiet enjoyment were broken, and that 18

breaches for both were duly assigned ; and I have shown that, if the value of the property at the time of *eviction is to be the measure of damages, it necessarily follows, that such diminished value is all which ought to be recovered. It is conceded, that, upon the covenant of seisin only, the recovery is to be confined to the consideration and interest. On the covenant for quiet enjoyment, therefore, the plaintiff must rely, to recover compensation for his improvements. Let us, then, examine whether, consistently with certain fixed legal principles, the covenantee can recover a greater sum of damages in any case under the covenant for quiet enjoyment, than under the covenant of seisin.

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An eviction must be shown before a suit can be maintained on the former covenant. Not so, however, as to the latter ; for that is broken, if the grantor has no title, the moment the deed is delivered ; and the grantee has an immediate right of action. Whenever the eviction is occasioned by a total want of title in the grantor, then both the covenants of seisin and for quiet enjoyment are equally broken ; and the grantee has his remedy on both. If he proceeds upon the first, he shall recover the consideration expressed in the deed, and the interest. But if he proceeds upon the last, it is said he shall recover according to the value at the time of eviction ; and, as I have before remarked, he must be content to recover according to the then value, even though it amounts to one half only of the consideration expressed in the deed.

The case would then stand thus. When the deed contains both these covenants, if the property at the time of eviction be worth one half of the consideration and interest, the grantee may, notwithstanding, upon the covenant of seisin, recover the whole consideration and interest. But if the property happen to be worth double the consideration money and interest, by reason of the improvements made thereon, he may waive the covenant of seisin, and resort to the covenant for quiet enjoyment ; and thus recover the whole amount. Can this be possible ? It appears to me, *that, to give such an effect to these covenants, is not reconcilable with any principle of law or justice.

My understanding of the nature of these covenants, when both are contained in the same deed, is this : That the covenant of seisin, which relates to the title, is the principal and superior covenant, to which the covenant for quiet enjoyment, which goes to the possession, is inferior and subordinate. And I am not aware that a case can possibly occur, where the grantor can recover a greater amount in damages for the breach of the latter, than of the former ; though there are many cases

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where he may recover less. The suit here is brought upon both covenants; and both, in consequence of the total failure of the defendant's title and the eviction, have been broken. The plaintiff, accordingly, has a right to recover on both; but as the amount of the recovery would, according to my ideas, be the same on each, he must elect on which of them he means to rely, and take nominal damages on the other. The plaintiff is entitled to but one satisfaction, and he has his remedy on either of the covenants, at his election, to obtain it. It will hardly be said, that he can have judgment for the same sum on both the covenants.

The covenant against encumbrances stands upon a different footing, and is governed by different principles. That is strictly a covenant of indemnity; and the grantee may recover to the full extent of any encumbrances upon the land, which he shall have been compelled to discharge. But even there it will be found, that the same rule prevails, in fixing the amount of damages, as in actions upon the covenants of seisin and for quiet enjoyment: that is, the party recovers what he has paid, with the interest, and no more.

But I consider the question arising in this cause as settled by authority; and that, according to established rules of law, the plaintiff is not entitled to any thing more than the value of the land, as settled by the consideration in the deed.

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*In suits upon the ancient covenant of warranty, beyond all dispute, the recovery was restricted to the value of the land at the time of making the covenant. Cases have occurred, in which the value of the land has been enhanced by subsequent beneficial improvements; but the rule as to the extent of satisfaction, has continued inflexibly the same, without regard to the increased value, by whatever cause it may have been produced. A personal action will not lie, on the covenant of warranty, upon the eviction of the freehold; (*Bac. Abr. tit. Cov. C.*) and for which reason, upon the introduction of alienations by bargain and sale, new covenants were devised, but solely for the purpose of securing to the bargainee the personal responsibility of the bargainor, in case of a failure of his title. I think I am warranted in saying, that it never was designed, by the insertion of these covenants, to establish any other rule of damages than what previously existed; because there is nothing in the terms of the covenants, from which an intention to extend the liability of the covenantor can be inferred; but the contrary is to be presumed, as not a single case is to be found where such a

construction of these covenants, which were in a great measure substituted for the covenant of warranty, has ever obtained. The covenant for quiet enjoyment, as I have before remarked, is that upon which compensation for the improvements is to be recovered, if at all. This covenant has a more strict analogy to the ancient covenant of warranty, than any of the other modern covenants. If, then, on the covenant of warranty, the satisfaction recovered in land was to be equivalent to the value of the lands granted, as it existed at the time when the covenant was made, I do conceive, that we are bound to adopt a correspondent rule, when satisfaction is sought to be recovered in money, in a personal action, on the covenant for quiet enjoyment.

Such a rule, moreover, I consider to be conformable to the intention of the parties. I question if one grantor out of ten thousand enters into these covenants with the remotest belief, that he is exposing himself and his posterity *to the ruinous consequences, which would result from the doctrine contended for by the counsel for the plaintiff. By giving this doctrine our sanction, we should, in my apprehension, create a most unexpected and oppressive responsibility, never contemplated by the parties, and inflict an equally unmerited punishment upon grantors acting with good faith, and having a perfect confidence in the validity of their title to the land, which they have transferred for what it is reasonably worth.

If any imposition is practised by the grantor, by the fraudulent suppression of truth, or suggestion of falsehood, in relation to his title, the grantee may have an action on the case, in the nature of a writ of deceit; and in such action he would recover to the full extent of his loss. (*Har. and But. Notes to Co. Litt.* 384. a. tit. *Warranty.* 1 *Fonb. Eq.* 366. 1 *Com. Dig.* 236. A. 8.)

I am aware that it is difficult to lay down any general rule on this subject, wholly free from objection. This is a difficulty which has been felt by the profoundest jurists in all ages. I think, however, that the rule of the common law, which obliges the grantor, when he believes he has a valid title, and acts without fraud, to refund what he has received, with the interest, is as equitable as any that has ever been established; and that this is all which, upon principles of the most rigorous justice, ought to be exacted from him.

My opinion, therefore, is, that, in this case, the plaintiff is entitled to recover the consideration money expressed in the deed, with the interest, and the costs of suit following the eviction, and no more.

SPENCER, J. It is submitted to the court, by the case made and argued in this cause, what is the correct rule of damages, upon covenants of seisin and for quiet enjoyment, contained in a deed conveying lands, in a case where the grantee has made

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improvements, and where the value of the land has appreciated. It is also made a question, whether *the plaintiff is entitled to recover interest on the consideration money paid for the lands.

It is to be regretted, that the case is so loose in several respects. It is fair, however, to infer from the case as it stands, and as it was argued, that, in point of fact, both covenants were broken; that the plaintiff was evicted for defect of title in the defendant, and that the plaintiff had made improvements, in the usual course of agriculture, on the lands conveyed by the defendant to him, of a substantial kind, to the value of 925 dollars.

The case of *Staats v. The Executors of Ten Eyck* (3 Caines, 112.) decides two of the questions which arise out of this case. In that case, though the value of the land had increased by extrinsic causes, the plaintiff was allowed to recover only the consideration paid, with the interest, costs, and counsel fees. The interest was allowed, because the purchaser was subject to an action for the mesne profits; and in the present case it is to be intended, that the plaintiff is liable to pay them to the person who has the title, and consequently it is to be allowed. It will be seen, that these two questions have received a similar determination in the Supreme Judicial Court of *Massachusetts*. (2 *Mass. Rep.* 433. *Marston v. Hobbs*.) In the case, before cited, of *Staats v. The Executors of Ten Eyck*, the court expressly reserved its opinion, upon a case like the present, where beneficial improvements have been made on the premises after the purchase. It was then considered, that there might be a difference between the case of the rise in value by the natural appreciation of lands, depending in a great measure on ideal worth, and the case of improvements of a beneficial kind.

This question I do not think has been settled in the *English* courts. It has never been decided in our own, and consequently it appears to me, that we are at full liberty to fix a rule, which shall bear analogy to other cases, and attain complete justice between the parties. I cannot pretend to say, that the rule which I shall lay down will be free from objection, when applied to all cases; and I am not sensible that any general rule, in almost any given case, will invariably *be free from exception. It is the very nature of general rules, sometimes to operate harshly; but the necessity of a fixed standard of justice is of more importance to the interests of men, than one that is capricious and fluctuating.

It has, I think, been erroneously said, that the defect of title is a case of mutual error; on the contrary, from my observation and knowledge of the sale of lands, I think the defect of title is a matter generally and almost universally in the peculiar knowledge of the vendor. It is a rare case for a purchaser to investigate the seller's title; and in most cases, it is impossible. The buyer relies on the allegations of the vendor, on his appa-

rent responsibility to reimburse in case of eviction, upon his possession of the property, and emphatically on his covenants of title and for quiet enjoyment. These covenants, whenever they occur in a deed, seem to me to indicate, beyond all question, that the purchaser did not mean to rely on the title of the vendor alone, but that he meant to have his personal liability as his guaranty. The language of the vendor corresponds with that of the purchaser, and holds out the idea that he had sold the land at his own peril, and that he would warrant it to be his. Extravagant cases have been put hypothetically, to show the enormous injustice of the rule, that the vendor must be answerable for improvements. It has been asked, if a piece of land thus sold, with covenants, should become the site of a flourishing city, what fortune could, under a rule allowing for improvements, withstand ruin? It may be retorted to such a question, What is to become of the industrious citizen or mechanic, who has spent his hard earnings in erecting his little house or workshop, relying on the covenant in his deed, if he can only get back his purchase-money and interest? It is not fair, however, to test a rule by extreme cases. To settle a general rule wisely and equitably, we should have an eye to cases which generally occur, and not be startled, on the one hand or the other, by those occurrences which are rare and few. In general, the defect of title happens in sales between man and man, *where the improvements are of the ordinary and beneficial kind. If the improvements are merely to gratify the eye of the individual, and to pamper his vanity and pride, a jury would be warranted to take those things into consideration in their assessment of damages.

I lay it down as a rule, which cannot require much illustration to enforce it, on the score of analogy and justice, that, in actions for a breach of covenant, the damages are to be estimated according to the value of the thing, when the covenant was broken. Thus, in a covenant for the delivery of specific property at a given day, in case of a failure, the rule invariably is, to allow in damages the value of the thing on the day it ought to have been delivered, and when the covenant was broken. So, also, on contracts for the delivery of stock, the value at the time it ought to have been delivered, and even at the time of trial, has been the criterion of damages. (2 *Burr.* 1010. 1 *Str.* 406. 2 *East*, 211.) (a) In the present case, the defendant covenanted that the plaintiff should quietly enjoy the land sold. This covenant was violated, when the plaintiff was evicted; and he has lost, by the breach of the covenant, not only the quiet enjoyment of the land, but the usufruct of those erections and improvements, without which, it is fair to say, that the land itself could not have been enjoyed, agreeably to the intention of the parties. It necessarily follows that, had the defendant kept his cove-

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(a) 7 *Cow. Rep.* 687. *Shepherd v. Hampton*, 3 *Wheat. Rep.* 200. *Douglass v. M'Allister*, 3 *Cranch*, 298.

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nant and allowed the plaintiff to enjoy the premises sold, he would not have been deprived of those improvements made on the thing itself, the making of which was an inducement to the purchase. How it can be called a severe doctrine to compel the vendor to respond in damages for ordinary and necessary improvements, I confess myself incapable of perceiving, when he has undertaken, for a price paid, to assure to the vendee the validity of his title. Very often, and perhaps generally, there is a want of due caution on the part of a vendor, who sells without title; and not unfrequently there is a mixture of fraud, which sets detection at defiance. The rule I have advanced, whilst it will restore to the innocent *vendee no more than he has actually lost, will induce greater caution in sellers, who, if responsible only for the principal and interest, will find the selling of land without title an easy and excellent method of raising money, instead of resorting to borrowing.

It follows, from the view I have taken of this question, that the plaintiff, under the covenant for quiet enjoyment, may recover the improvements; and that under the covenant of seisin he could not, unless the grantee was seised by virtue of the deed, and has been evicted under a title paramount. I have not entered into any examination of the ancient method of proceeding under the *warrantia chartæ*, and the rule which obtained in such case, under the writ of *cape ad valentiam*; because the covenants of warranty were then considered as real covenants binding only on the grantor and his heirs. It has, however, been urged that the introduction of the covenants of seisin and for quiet enjoyment, were substitutes for the covenant of warranty, and that the same rule ought to follow the substituted covenants. It appears to me much more proper to consider the introduction of personal covenants in the alienation of real property, as immediately assimilating themselves to other personal covenants and contracts, and as subject to the same rules of construction, and the same rule of damages, whenever they are broken. If so, the covenant for quiet enjoyment was not broken until the eviction, and the rule of damages would be the property lost at the time, which would include the price paid for the land, and the value of those erections and improvements which had been added at the plaintiff's expense. It is supposed, that though the covenants of seisin and for quiet enjoyment are distinct, and regard different objects, yet that where the first fails, the latter is merged in it. This principle strikes me as illogical, and unfounded in authority.

There are authorities (*Freem.* 450. pl. 612. 6 *Vin.* 426. pl. 20. *Ibid.* 476. pl. 4.) which show, that where, in a deed, a man covenants that he hath a good right to convey, &c., and that the party shall quietly enjoy, one covenant goes to the title, and the other to the possession. And why a person who

[* 17] has broken two distinct agreements, should protect *himself

from a responsibility on both, and be liable only on the least extensive one, surpasses my powers of comprehension. A case has been mentioned as decided in the Supreme Court of *Pennsylvania*, (4 *Dal.* 436.) as bearing on the present; it will be found to have been on the mere covenant of seisin, and power, &c. to convey in fee. The rule I have adopted meets that case, and is reconcilable with it; for there the covenant was broken as soon as it was made, and the damages then sustained were the consideration money and interest.

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KENT, Ch. J. The declaration in this case is upon two distinct covenants in the deed, to wit, the covenant of seisin, and the covenant for quiet enjoyment; and the verdict was taken for the plaintiff, subject to the opinion of the court, as to the rule of damages. We must take it for granted upon this case, and so it seems to have been understood and admitted upon the argument, that both covenants were broken, and the question, then, is, What is the measure of damages, when the two covenants are the subject of one action, and a breach of each has been duly assigned and proved?

The case of *Staats v. The Executors of Ten Eyck* goes very far towards a decision of this question. That was a suit upon the same covenants, and a breach of both was admitted. The point submitted was the rule of damages, "under the covenants mentioned in the deed. The court adjudged that the rule of damages was the consideration money and interest; and I observed, in giving my opinion in that case, that the covenant for quiet enjoyment could have no greater operation, as to damages, than the covenant of seisin. Mr. Justice *Livingston*, who also gave his opinion, was silent upon that point; but it was a necessary consequence of the judgment of the court, that the increased value of the land could not be recovered under either of those covenants. The doctrine that the measure of damages, under the covenant for quiet enjoyment, is to be computed from the time of eviction, and to include the then value, even when the title has totally failed, and the covenant of seisin broken, cannot possibly be reconciled with that decision. I do not wish, however, to rest my opinion in this case solely upon that authority. As the question is of great importance, I am content to re-examine it at large.

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What would be the rule of damages under a covenant for quiet enjoyment, if a breach of that covenant was shown which did not amount to a breach of the covenant of seisin, or if that covenant stood alone in a deed, unaccompanied with the covenant of seisin, is not a point at present before us. If, however, it stood alone in a deed, I should think, as at present advised, that, upon a total failure of title, the damages would be the same as in the covenant of seisin, and no more; for the analogy is very close between that covenant and the ancient warranty. But when the covenant for quiet enjoyment follows

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a covenant of seisin in the same deed, the intent of the instrument, taken together, appears manifestly to be, that the one covenant is merely auxiliary to the other, as the one covenant relates to the title, and the other refers to the future enjoyment of that title. The covenant for quiet enjoyment respects the possession merely, and it would seem to be unreasonable and very inconsistent, for the plaintiff to recover under one covenant the whole value of the estate, as it was intended to be conveyed, and under another covenant in the same deed, distinct and increased damages, because he was not permitted to enjoy that estate. These covenants must be taken in connection, to ascertain their import. The covenant for further assurance is one of these secondary covenants, and if the grantor had no title, and the value of the land was recovered back by the grantee, he could not be called upon in damages for further assurance. This would be very idle when it had been ascertained by the recovery under the principal covenant that he had nothing to assure. If the grantee recovers what is to be deemed, upon established principles, the value of the land, under the covenant of *title, it amounts, in effect, to a satisfaction and extinguishment of the covenants relative to the possession, and the grantee cannot receive any thing more than nominal damages under those covenants. There is no precedent to authorize any greater recovery, under the covenant for quiet enjoyment than under the covenant of seisin; and the universal silence in the books on a point which so frequently gives occasion for litigation, is a strong argument to prove that no such rule exists as that contended for by the plaintiff. I believe it has never been the received opinion with us, that in a deed containing the usual covenants, viz. the covenant of title or seisin, and the covenant relative to the possession, the latter covenants, in a case of no title, and consequently of a breach of the covenant of title, would become paramount covenants, and afford a larger claim for damages. The latter construction would not only introduce a rule hitherto undiscovered in the common law of *England*, but a rule of great moment in its immediate consequences to the community; and I must be thoroughly persuaded of the soundness of the construction, either upon authority or principle, before I can consent to adopt it. When, therefore, there is no authority for such a construction to be met with in the decisions at *Westminster Hall*, and it appears to be repugnant to the natural and reasonable interpretation of the covenants, as found in connection in the same deed, I must adhere to the opinion which I gave in the case of *Staats v. The Executors of Ten Eyck*, and which must, from a view of that case, have been also the unanimous opinion of the court.

The case before us, then, resolves itself into this question, What is the extent of the rule of damages on a breach of the covenant of seisin?

Three points are submitted by the case:

1. Whether the plaintiff can recover interest on the consideration paid ;

2. Whether he can recover for the *increased value* of the land ; and

*3. Whether he can recover for his *beneficial improvements*.

The two first points were settled in the case of *Staats v. Ten Eyck*, and need not again be examined. Nothing has been shown which affects the accuracy of that decision on those points, and it deserves notice as being of great weight in support of that decision, that in the states of *Massachusetts* and *Pennsylvania*, the same rule of damages is established in an action for the breach of the covenant of seisin. The third point was reserved in the consideration of the former case, and no opinion expressed upon it. It, therefore, remains open for discussion.

I must own that I never perceived any ground for a distinction as to the damages, between the rise in the value of the land, and the improvements. There is no reason for such a distinction, deducible from the nature of the covenant of seisin. Improvements made upon the land were never the subject matter of the contract of sale, any more than its gradual increase or diminution in value. The subject of the contract was the land as it existed, and was worth, when the contract was made. The purchaser may have made the purchase under the expectation of a great rise in the value of the land, or of great improvements to be made by the application of his wealth, or his labor. But such expectations must have been confined to one party only, and not have entered as an ingredient into the bargain. It was the land and its price, at the time of the sale, which the parties had in view, and to that subject the operation of the contract ought to be confined. The argument in favor of the value of the land, and the improvements as they exist at the time of eviction, has generally excepted cases of extraordinary increase, and of very expensive improvements. It seems to have been admitted, that, without such a limitation to the doctrine, it could not be endured. But this destroys every thing like a fixed rule on the subject, and places the question of damages in a most inconvenient and dangerous uncertainty. We have a striking illustration of this in the *French law*: The rule in *France*, upon *bona fide* sales, according to *Pothier*, (*Traité du Contrat de Vente*, No. 132 to No. 141.) is to make the seller, on eviction of the buyer, refund not the only original price, but the increased value of the land, and the expense of the meliorations made. He admits, however, that the intention of the parties is to be the rule in the assessment of damages, and that, in the case of an immense augmentation in the price of the land, or in the value of the improvements, the seller is to answer only for the moderate damages which the parties could be supposed to have anticipated when the contract was made. It is plainly to be perceived, that there is no certainty in such a loose application of the rule,

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and that it leaves the damages to an arbitrary and undefined discretion, and so it appears to have been understood; for in the "*Institution au Droit François*," by M. *Argou*, (liv. 3. c. 23.) it is laid down, that "the question of damages, beyond the price paid, is with them *very arbitrary*." This is not consonant to the genius of our law, nor does it recommend itself well for our adoption. On a subject of such general concern, and of such momentous interest, as the usual covenants in a conveyance of land, the standard for the computation of damages, upon a failure of title, (whatever that standard may be,) ought, at least, to be certain and notorious. The seller and the purchaser are equally interested in having the rule fixed. I agree, that the contract is to be construed according to the intention of the parties; but I consider, that the intention of the covenant of *seisin*, as uniformly expounded in the *English* law, is only to indemnify the grantee for the consideration paid. This was the settled rule at common law, upon the ancient warranty, of which this covenant of seisin is one of the substitutes; and all the reasons of policy which prevent the extension of the covenant to the increased value of the land, apply equally, if not more strongly, to prevent its extension to improvements made by the purchaser. A seller may be presumed, at all times, able to return the consideration which he actually received; but to compel him to pay for expensive improvements, of the extent *of which he could have made no calculation, and for which he received no consideration, may suddenly overwhelm him and his family in irretrievable ruin. The common law never left the vendor in such a state of uncertainty; and it made no distinction between the natural rise of the land, and its increased value, by buildings, or other improvements. The *feoffor* was still to answer only for the value of the land, as it was worth when the feoffment was made. This was the amount of the decision in the *Year-Book*, 30 *Ed.* III. 14. b. A man had a wardship, and granted it over, with warranty, and, afterwards, the grantee was impleaded, and vouched the grantor. Now the wardship was of more value at the time of the voucher, than it was at the time of the grant, with warranty, by reason of other lands descending, afterwards, or by buildings or otherwise, and it was held, that the vouchee could take protestation of this matter when he entered into the warranty, i. e. when he was admitted to defend, instead of the original tenant. And *Burton* laid this down for law, that if land be better after the feoffment made by buildings or otherwise, he who receives in value, receives but according as the land was worth at the time of the feoffment, and not more. The same rule was laid down for law by *Newton*, J., in the *Year-Book*, 19 *H. VI.* 46. a. and again, in 61. a. and he says it had been so adjudged, and he refers to the decision in 30 *Ed.* III. which he said was not controverted. This rule, upon the sanction of these authorities, has been incorporated, as

good law, into the abridgments of *Fitzherbert*, *Brooke*, and *Rolle*. But the case of *Ballet v. Ballet*, (*Godb.* 151.) in the time of *Ja. I.* is a much more modern determination upon the same point. That was a case of a writ of *warrantia chartæ*, and, upon demurrer, the court held, that if there be new buildings, of which the warranty was demanded, which were not at the time of the warranty made, and the deed is shown, the defendant ought not to demur, but to show the special matter, and enter into the warranty for so much as was at the time of the making of the deed, and not for the *residue. Indeed, the point is too clear to admit of doubt, that the increased value of the land by buildings or other improvements, made no alteration, at common law, in the rule of damages; and, for the reasons given in the former case of *Staats and Ten Eyck*, (a) it can make no alteration in the covenant of seisin, which, as to the rule of compensation, is commensurate only with the ancient warranty.

I am, therefore, of opinion, in this case, that the sum allowed for the increased value of the land, and the sum allowed for improvements, be deducted from the verdict, and that judgment be entered for the residue only.

THOMPSON, J., and YATES, J., concurred.

Judgment accordingly.

a) 3 *Caines's Rep.* 112.

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E. and C. KIP, Administrators of S. KIP; *against*
D. DENISTON.

Where two trustees for the sale of an estate joined in a conveyance, and both acknowledged the receipt of the consideration money, but the money went into the hands of one of the trustees, it was held, that the other was not answerable for the money so received by his co-trustee, and misapplied.

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THIS was an action for *money had and received*, brought against the defendant, as survivor of *Isaac Van Vleck*, to recover the intestate's proportion of moneys raised by the sales of certain lands, and alleged to have been received by the defendant and *Van Vleck*, under an authority vested in them, and two other persons, under the following circumstances:

By an indenture, dated the 6th *January*, 1795, to which the intestate, the defendant and others were parties, it was agreed, that the parties were entitled to lands therein mentioned, (of which the lands, by the sale of which the money in question was raised, were parcel,) in the proportions specified, and, among others, that the intestate and three other persons were entitled to two eighth parts as tenants in common, and in particular the intestate to one sixth of the two eighths; that by the deed the parties agreed *that partition should be made, and that the two eighth parts, when ascertained, should be sold, and the money distributed according to their interests; and for that purpose the defendant and *Isaac Van Vleck*, and *H. H. Kip*, and *S. Breese*, all parties to the deed, and interested in the two eighths, or any two of them, were by the deed empowered to make the sales and to pay the moneys into one of the banks for distribution.

All the parties to the deed derived title from *Sarah Kiersted*, and the intestate from *Catharine*, his mother.

A partition of the lands was made according to the agreement. Two sales were made by the persons authorized, of the parts wherein the intestate was interested. The proceeds of the first sale were distributed, and the intestate received his share. The second sale took place on the 17th *June*, 1800, after the death of *H. H. Kip* and *S. Breese*, but in the life-time of the defendant and *Isaac Van Vleck*, and was made by them as survivors, and the intestate's share of the proceeds amounted to 343 dollars. The defendant joined in the sales and conveyances, in which the consideration money was acknowledged. The money raised by the second sale was not deposited in the banks, and *went into the hands of Isaac Van Vleck*. The defendant never received any part of it, unless the receipt in the conveyances is to be considered, in law, as a receipt by the defendant, or by him and *Van Vleck*. The share of the intestate was never paid to him or the plaintiffs. *Van Vleck* died before the commencement of this suit.

The intestate's share of the moneys raised by the second sale was withheld in consequence of a claim to it by *Abraham S. Van Vleck*, one of the parties to the deed of *January*, 1795;

and the defence set up was, that the right of the intestate descended from his mother, *Catharine*, who was the wife of *Jacobus Kip*; and that *Jacobus* and his wife, on the 1st of *September*, 1736, by a deed-poll, discovered since the execution of the deed of 6th *January*, 1795, had sold the share of *Catharine* to *Abraham Van Vleck*, father of *Abraham S. Van Vleck*, in fee. This deed of 1736 was offered *in evidence, but it did not appear to have been acknowledged or proved. It was objected to, but admitted, reserving the exception. It purported to be a bargain and sale of the share of *Catharine* in the lands comprised in the deed of *January*, 1795, to the said *Abraham Van Vleck* in fee, for the consideration of 23l. It did not appear that *Abraham Van Vleck* was in possession at the date of the deed, or at any time after; but at the date of the deed he was seised of one sixth of the same lands; and he, with *Jacobus Kip* and *Catharine*, his wife, in right of *Catharine* and several others, were tenants in common thereof. There was no adverse possession to that of the tenants in common; but the premises were in the actual possession of the corporation of *New-York*, or of others, not holding under *Abraham Van Vleck*, or any of the tenants in common, nor claiming adversely to them, and so they continued until *January*, 1795.

The jury gave a verdict for the plaintiffs for 487 dollars, subject to the opinion of the court on the above case.

The following points were stated, and submitted to the court without argument:—

The plaintiffs contend,

1. That the receipt of the money, as stated, was in law the receipt of both the defendant and *Van Vleck*, though, by consent of the defendant, it went into the hands of *Van Vleck*.
2. That the defendant was bound to see the money paid to one of the banks for distribution.
3. That the intestate's share is recoverable in this action.
4. That the deed of 1736 was not admissible, because not proved, and because the deed of 6th *January*, 1795, concluded the defendant and *Abraham S. Van Vleck*, as to the interest of the intestate in the premises.

*5. That the deed of the 6th *January*, 1795, concludes the parties as to the rights designated therein, and estops them from setting up any title inconsistent with it.

The defendant contends,

That the plaintiffs cannot recover in the equitable action for money had and received, but must resort (if he can recover at all) to an action of covenant upon the indenture of 6th *January*, 1795.

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Per Curiam. There is no pretence to charge the defendant in this case. His counsel, by the points which they have raised and submitted to the court, have properly omitted to urge, as a ground of defence, the deed of 1736. The indenture of 1795 concludes the parties from setting up any right under that old dormant deed, if it was (and which we do not admit) admissible in evidence as an ancient deed without proof. But the true and solid ground of defence is, that if two trustees for the sale of an estate join in the conveyance, and that conveyance includes a receipt for the consideration money, one trustee is not answerable for the money which goes into the hands of the other, and is by him misapplied. Their joining in the conveyance and receipt was necessary. This point is abundantly settled by the authorities. (*Cro. Car.* 312. 1 *Eq. Ca. Abr.* 398. 1 *Atk.* 89. 3 *Atk.* 583. 2 *Vern.* 515. *Amb.* 218. *Prec. in Chanc.* 173. 4 *Ves. jun.* 596.) The defendant is, therefore, entitled to judgment.

Judgment for the defendant.

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*S. THOMPSON *against* ROBERTSON and BROWNE.

The person to whom a bill is remitted in payment of a precedent debt, cannot, in case of a protest, recover the 20 per cent. damages from the remitter. A bill was remitted by A. to B., in payment of a precedent debt, and

was specially endorsed to B. The bill having been protested for non-payment, B. afterwards endorsed it to C., who paid him the amount. C. struck out all the intermediate endorsements on the bill, and brought his action as a first endorsee against the first endorsers, to recover the amount, with damages. It was held, that after the protest, B. was the mere agent of A., in regard to the bill, and ought to have returned it to him; that C., having taken the bill with a full knowledge of the situation of B., must stand in his place, and be entitled to the same rights, and no more; and could not, therefore, recover the 20 per cent. damages; and that A., the person who remitted the bill, was the only person entitled to damages. Where a bill is first endorsed in blank, and afterwards specially endorsed, whether the subsequent holder can strike out the special endorsement, and bring his action as a first endorsee *Quere.*

cause was tried at the sittings in *New-York*, in *December*, 1806, before Mr. Justice *Livingston*. It was admitted, by a written agreement between the parties, that the principal of the bill had been paid by the defendants to the plaintiff, without prejudice to either party, as to the question of damages, to recover which was the only object of the present suit. The first of the set of exchange was protested for non-payment, and due notice of the non-acceptance and non-payment of the bill was given to the defendants. At the time of the protest for non-payment, the bill was held by *James Palmer*, who afterwards endorsed it, but his name was erased on the bill produced. At the trial, the plaintiff read in evidence the first of exchange, on which were the same endorsements as on the other; all of which were erased except the first made by the defendants to the plaintiff.

It was proved by the defendants, (though the evidence was objected to, but admitted,) that in *February*, 1804, and before that time, *John M'Call* was a merchant in *London*, and held a correspondence with *James Thompson*, of *New-York*, and was in the habit of receiving and executing orders *given to him for merchandise, and that prior to *February*, 1804, in the usual course of business, he received orders from *J. Thompson*, to ship to him, for his account and risk, a quantity of hosiery; that *M'Call*, declining to execute the order, delivered it to *James Palmer*, a merchant in *London*, to be executed; that *Palmer*, in pursuance of the order, shipped to *J. Thompson* the goods desired, which were received by *M'Call*, who put them on board a ship for *New-York*, and forwarded the invoices to *J. Thompson*, with a letter of advice to him, to remit the amount to *Palmer*. The goods were shipped by *Palmer* on the credit of *J. Thompson*, and an account between them, with a balance stated, was exhibited in evidence. In a letter, dated the 20th *August*, 1804, *Palmer* pressed *J. Thompson* for the payment of the balance due on the goods. On the 31st *October*, 1804, *Palmer* wrote to *J. Thompson*, acknowledging the receipt of the bill of exchange for 700*l.* which he agreed to place to the credit of *J. Thompson*, when paid, mentioning that it was not accepted, and that the drawees desired it might be presented again, after the next packet arrived. On the 30th *April*, 1805, *Palmer* wrote to *J. Thompson*, that being put to inconvenience on account of the non-payment of the bill, he had disposed of it to a gentleman in *London*, and that, as *J. Thompson* would not suffer any more inconvenience from this disposal of it, than if it had been a good bill, he could not complain, &c.

The judge charged the jury, that the plaintiff was not entitled to recover the damages on the bill from the defendants, that the bill having been remitted by *J. Thompson*, to *Palmer*, in payment of a precedent debt, and he having refused to

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credit *J. Thompson* with the bill till it was paid, he could be considered only as holding it as the agent of *J. Thompson*, and ought to have returned it to him, as soon as it was dishonored; that *Palmer* having negotiated the bill after it was protested for non-payment, the plaintiff had no other rights than *Palmer* possessed when the bill fell due in his *hands. The jury, therefore, found a verdict for the defendants.

The plaintiff moved to set aside the verdict, for the misdirection of the judge.

D. A. Ogden, for the plaintiff. This is a suit against the first endorsers, not against the remitter. Though the bill was limited by the endorsement of *J. Thompson*, yet the first endorsement being in blank, the fair holder may strike out all the intermediate endorsements, and recover as the endorsee of the first endorser. (*Chitty*, 103. 261. *Kyd*. 296. 4 *Esp. Rep.* 211. *Peake's N. P.* 225.) Admitting, then, that *J. Thompson* remitted the bill to *Palmer*, in payment of a precedent debt, it cannot vary the right of the present plaintiff to the damages, which necessarily follow his right to recover as the first endorsee of the bill. The plaintiff had a right to pay the bill after the protest. Any person, a mere stranger, may pay a bill *supra* protest, for the honor of any party to the bill, and will thereby become entitled to all the rights of the holder. (*Chitty*, 202. 230.)

Colden and Hoffman, contra. As the bill was in the hands of *Palmer* when it became due, whoever received it afterwards must take it subject to all the equity against the holder. He substitutes himself in the place of the holder. (1 *Caines*, 258. 2 *Caines*, 372. 7 *Term Rep.* 423. 3 *Term Rep.* 82. 2 *Johns. Rep.* 306. 3 *Caines*, 279.) The plaintiff can have no right to recover, if *Palmer* had none, and *Palmer* cannot maintain a suit against *James Thompson*, or either of the parties, for he received the bill not as an endorsee in the course of business, but as a mere agent for *James Thompson*, to whom he was bound to return the bill.

Again, there was a special endorsement to *Palmer*, who had no power to transfer the bill. Though a person who receives a note before it is due, may strike out the intermediate endorsements, he cannot do so, when he takes it after it has become due.

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*Admitting that the plaintiff might recover on the bill, still he is not entitled to the 20 per cent. damages.

In *Kenworthy v. Hopkins*, (1 *Johns. Cas.* 107. 1 *Dallas*, 261. 4 *Dallas*, 155.) it was decided that where a bill is remitted to a person to discharge a precedent debt, he cannot recover the damages, in case of a protest. The creditor to whom the bill is remitted must recover interest on his debt, and he ought not to recover the damages also.

When a bill is paid *supra* protest, the person paying it must always show for whose honor it was paid. As no person is designated, it may be presumed to have been paid for the honor of the defendants. If so, the plaintiff cannot recover damages of them.

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Harison, in reply, observed, that whatever may be the relative rights between *James Thompson* and the holder of the bill, the defendants cannot make any objection; for they are liable at all events, and must pay. The principal cannot be recovered of one person, and the damages of another. One is the inseparable incident of the other; they cannot be severed. The case of *Kenworthy v. Hopkins* applies only in the case where the person to whom a bill is remitted for a precedent debt, brings his action against the remitter. It is not applicable where a third person is the holder of the bill.

SPENCER, J., delivered the opinion of the court. The case of *Kenworthy v. Hopkins* is an authority for saying, that the person to whom a bill is remitted for the purpose of paying a precedent debt, cannot recover against the remitter, the 20 per cent. damages. I am satisfied that this decision is correct, because in such case, as the bill never was taken in the usual course of trade, the right of the party to whom the bill was remitted, extended only to the receiving the money due, or, in case of non-payment, of returning the bill. It was not his but for special qualified purposes. *In the present case the suit is not against the remitting merchant, but the objection comes from endorser.

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This case, then, must turn, not upon any right which the defendants have to make the objection to the payment of the damages, but upon the plaintiff's title to them, as against the defendants. The bill in question having been remitted at the risk of *James Thompson*, I consider him, in law and justice, as entitled to the damages, he having encountered all the hazard and inconvenience of the remittance. There is no doubt that on the protest of a bill for non-payment, it may be paid by any one, *supra* protest, for the honor of the drawer or endorser, and such person thereby acquires all the rights that the proprietor of the bill had. (*Chitty*, 230.) Accordingly it was ruled by Lord *Kenyon*, in the case of *Mertens v. Winnington*, (1 *Esp. Rep.* 113.) that where a bill is so taken up, the party who does so, is to be considered an endorsee paying full value for the bill, and as such is entitled to all the remedies to which an endorsee would be entitled, that is, to sue all the parties to the bill. In the present case, *James Thompson*, the remitter of the bill, made a special endorsement, by which he directed the bill to be paid to *James Palmer*, to be placed to the credit of *John M Call* or order. This endorsement the

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plaintiff, who came by the bill by endorsement from *James Palmer*, and, after it was protested for non-payment, struck out, and thereby sets up a title as the immediate endorsee of the defendants, whose endorsement was in blank. When the plaintiff took this bill, he must have seen that it was in the possession of *Palmer*, merely as agent for *James Thompson*, and, in fact, that *Palmer* had no right to negotiate it. Without giving any opinion upon the question, whether a person who gets possession of a bill, at first endorsed in blank, and afterwards specially endorsed, may strike out such special endorsement, it appears very evident in this case, that the plaintiff came to the possession of this bill collusively, and with full knowledge that *Palmer* had no right to raise money on it: and it is very certain, that the plaintiff paid the bill for the honor of no one. Under these circumstances, we are satisfied, that the plaintiff has *received all that he is entitled to on the bill; and that, with regard to the 20 per cent., the plaintiff has shown no right to those damages, his payment not being the ordinary payment of a bill *supra* protest, for the honor of the parties on the bill, but evidently in concert with *Palmer* to gain a right to the damages. We, therefore, refuse a new trial.

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New trial refused.

WARNE *against* CONSTANT, Sheriff, &c.

A prisoner in execution, having given security for the liberties, resided with his family within the gaol limits, and having afterwards obtained a writ of *supersedeas*, which was delivered to the sheriff, demanded his discharge, which was refused by the sheriff, unless his poundage fees were paid. He afterwards continued to reside within the limits for two or three months, and brought his action for false imprisonment against the sheriff. It was held, that after the *supersedeas*, no formal discharge from the sheriff was necessary, and that the party having continued within the limits voluntarily, under a mistaken apprehension that such a discharge was requisite, no action would lie against the sheriff.

THIS was an action of *trespass* and *false imprisonment*. The cause was tried at the sittings in *New-York*, on the 4th *June*, 1806, before Mr. Justice *Thompson*.

The plaintiff proved, upon the trial, that between *February* and *May*, 1804, having been arrested by the defendant on a *ca. sa.*, at the suit of one *Frederick De Peyster*, he executed a bond, according to law, for the *gaol liberties*, and resided with

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his family within the limits. The defendant returned the plaintiff in custody on the *ca. sa.* On the 11th of *May*, 1804, a *supersedeas* to that writ from this court was delivered to the sheriff, and a discharge of the plaintiff requested, which the defendant refused, unless the *poundage fees*, on the *ca. sa.*, were paid to him. On the 12th of *May*, this court awarded a writ of *habeas corpus*, on an affidavit that the plaintiff was not discharged on the *supersedeas*. To this *habeas corpus* the defendant returned, on the 15th of *May*, that, on the 18th of *February*, the plaintiff had been committed to his custody by a *ca. sa.*, and that he still remained in his custody, for his fees due on the said execution. The court, upon reading the return, ordered the plaintiff to be discharged. The plaintiff, after this order, remained in the limits, with his family, for two or three months, and he never personally demanded *his discharge, though it was demanded by his attorney on record. The counsel for the defendant objected, that an action of trespass and false imprisonment would not lie, but that if any suit could be maintained, it must be *trespass on the case*.

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The judge ruled, that the plaintiff, being upon the limits, at liberty to go at large if he chose to risk a suit upon his bond, and subject to no other restraint, could not maintain this action, and ordered the plaintiff to be nonsuited. A motion was made to set aside the nonsuit.

The cause was submitted to the court without argument.

YATES, J., delivered the opinion of the court. The only question presented for the consideration of the court is, whether the situation of the plaintiff, while thus residing with his family within the liberties of the gaol, can be deemed such a restraint as to constitute *false imprisonment*, and, consequently, enable him to sustain this action.

The bond given by him for the *gaol liberties*, under the statute, (a) could only continue operative, so long as the authority, by virtue of which he was at first confined, and on which the bond is grounded, remained in force. The delivery of the *supersedeas* to the defendant destroyed the further operation of the *ca. sa.*, and with it, the necessity for, or further effect of, the security, so that the plaintiff was thereby virtually and legally discharged from imprisonment, and might, immediately thereafter, have left the *gaol liberties*, without risking any thing, had he been so disposed, nor could the sheriff legally have prevented his departure.

It must be presumed, that the plaintiff applied for the *supersedeas* to the court, and, consequently, knew when it issued. With full notice of his situation, he now seeks damages from the sheriff, for ignorantly continuing within the *gaol liberties*.

*It does not appear, that, during this time, he attempted to

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leave the *liberties*, but continued there under the mistaken impression that he could not depart without a formal discharge from the defendant, as sheriff. Had such an attempt been made, and frustrated by violent measures on the part of this officer, such conduct would have subjected him to the responsibility now sought for, and the present action might then, perhaps, have been properly sustained; but, as nothing more appears than a refusal by the sheriff, on the application of the attorney, to give him a discharge, which was *not necessary*, from a confinement, without any violence or coercion to detain him, and merely *ideal*, we are of opinion, that the judge properly ruled, that this restraint, under all the circumstances, was not sufficient to sustain the action, and that a judgment of nonsuit must be entered.

Judgment of nonsuit.

GRANT and SWIFT against M'LACHLIN.

An American vessel was captured by a French privateer, and carried into *Porto Rico*, a Spanish

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port, and from thence to *Samana*, where she was put in requisition by the French government, and sent to *Barracoa*, where she was dismantled and abandoned.

The vessel, having stranded on the beach, was, some months after, sold at auction by the commanding officer of the port, and purchased by an American, who, afterwards, repaired her, at great expense, and brought her to *New-York*,

THIS was an action of *trover* for a vessel called the *William*, of *Hallowell*, *Kennebeck*. The cause was tried at the sittings in *New-York*, on the 24th December, 1807, before Mr. Justice *Spencer*.

In the autumn of the year 1804, the plaintiffs were owners of the vessel in question, and in *November*, 1804, *sent her on a voyage from the *United States* to the *West Indies*. *Swift*, one of the plaintiffs, was master. During the voyage, the vessel was captured by a French privateer, and carried into *Porto Rico*, a Spanish port. It appeared, from the testimony of the mate, that the Spanish government refused to take any steps for the trial and condemnation of the vessel. The mate went afterwards to *St. Domingo*, and there made protest against the captors. The governor-general, *Ferrand*, declared, that the vessel should be delivered up within three days after her arrival there. The captors took the vessel to *Samana*, a small island on the N. E. side of *St. Domingo*, then under the French government, and there discharged her cargo. The vessel was put in requisition by the French government, to carry 140 passengers to *Barracoa*, where she arrived in *February* or *March*, 1805, in a dismantled condition, under the command of a captain *Lannois*. About two months after her arrival, she was

where she was claimed by the original owner. In an action of *trover*, brought by the original owner, it was held, that the vessel being abandoned, and a wreck, and having been sold by the government at *Barracoa*, according to the laws of *Spain*, in cases of wreck or derelict, the property was transferred by the sale to the purchaser, who thereby acquired a valid title against all the world.

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abandoned by *Lannois*, who went to sea in a *French* privateer. The vessel lay 9 or 10 months, without any person on board; all her sails, rigging, blocks, masts, and spars, except the bowsprit, were taken away, and she was used as a hulk by which to heave down vessels. Her cables, having become rotten, parted, and she was driven on shore, where she lay with four feet of water in her hold, at high water.

The defendant, in *November*, 1805, purchased the vessel at *Barracoa*, for 54 dollars, where she was sold by order of the *Spanish* commissary, with several other old vessels, at auction; she was got off and repaired, and arrived afterwards at the port of *New-York*, having changed her name, where the plaintiffs found and demanded her of the defendant, who refused to deliver her up. It appeared from the testimony, that 50 dollars was the value of the vessel, at the time she was sold at auction; and that the defendant laid out near 2,000 dollars in repairing her. Several witnesses, who had been at *Barracoa*, and professed to be acquainted with the laws there, testified, that by the laws of *Spain*, any vessel which had been abandoned, and *become derelict, might, in 24 hours after, be sold by the king's agent and commissary, as a *droit* of the king.

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The defendant's counsel produced a certificate in the *Spanish* language, which was objected to on the part of the plaintiffs; but a translation of it was read, by consent, reserving all questions as to its admissibility. It was as follows:

"I, *Louis Anne de Aleivar*, lieutenant in the royal marine, military commandant of this city and its jurisdiction, king's port captain, CERTIFY, that the register of the port proceedings in my charge, records, that, on the 17th day of *March*, last year, there arrived at this port from *Samana*, in the island of *St. Domingo*, the *American* schooner *William*, having on board 140 passengers, black and white, with some plank and staves; and that the captain and supercargo, *John Joseph Lannois*, abandoned the hull of the said vessel, leaving it stript, wanting cables, and funds to meet the expenses, as he declared the same, at this office, having sold the little that remained of the sails, cordage, and other effects of the said schooner; and that it may have faith before whomsoever it may be brought, I grant the present declaration to Captain *P. M'Lachlin*, who has satisfied me in paying to this office 54 dollars for the purchase of the said hull of the said vessel, so abandoned and stranded on the beach of this port. City of our Lady of Assumption, *Barracoa*, 8th *January*, 1806.

Signed

"LOUIS ANNE."

To this paper was attached the certificate of a notary at *Barracoa*.

The *Spanish* consul at *New-York*, and the *American* consul

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at the *Havana*, were called as witnesses, and testified, that by the laws of *Spain*, which have equal force in the *Spanish* colonies, a vessel found stranded and deserted on the coast might be sold for the benefit of the owners, and the proceeds carried to the royal treasury, and, if not claimed in a certain time, belonged to the crown; that the proper officer may sell at public auction, without any other *proceeding than two or three days' notice of the sale, which is not in the nature of a monition, nor is any proceeding of a judicial nature requisite to try the fact whether the vessel be derelict or not; that the *Spanish* document produced was conformable to the laws of *Spain*, and would be received as evidence of the truth of the facts contained in it, in any *Spanish* court; that courts of admiralty were established in the colonies as well as in the mother country, which were governed by the law of nations, and had the same jurisdiction as courts of admiralty in other countries. The value of the vessel, before she sailed to the *West Indies* and at the time of the demand and refusal, was proved.

The jury, under the direction of the judge, found a verdict for the plaintiffs, subject to the opinion of the court; that if the court should be of opinion that the plaintiffs were entitled only to the value of the vessel as she was bought at *Barracoa*, then they assessed the damages at 54 dollars; and if the court should be of opinion that the plaintiffs were entitled to recover the value of the vessel at the time of the demand and refusal, then they assessed the damages at 2,300 dollars; but if the court should decide that the plaintiffs were not entitled to recover, then judgment was to be entered for the defendant.

Colden, for the plaintiffs. The question is, whether the property in the vessel has been changed. Personal property can be transferred only by the consent of the owner, or by operation of law. The consent of the owners is not pretended. Admitting that, by the laws of *Spain*, the property, under the circumstances of the case, might have been changed, yet there is no evidence that the sale has been made according to the laws of *Spain*. All the witnesses, except the *Spanish* consul, who have deposed as to the laws of *Spain*, speak from hearsay, and are not agreed as to the time the property is to remain derelict. To render a vessel a *derelict*, she must have been abandoned without any intention on the part of the owner or his agents to return to her. One of the witnesses states, that he went to *Barracoa* for the express purpose *of reclaiming her, and, from the time the vessel was first captured, the captain and mate were in pursuit of her. A *wreck* is where a vessel is driven on shore by the sea, and lost or abandoned. If pirates take a ship and turn her adrift, and she is cast on shore, this is not such a wreck as to render it a *droit* of the king. (*Hargrave's Law Tracts*, 38. 2 *Inst.* 167.)

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It is well known, that *Spain* has a regular code of maritime laws, (1 *Azuni*, 405. *Johns. Tran.*) and the law of that country, in cases like the present, ought to have been clearly and satisfactorily shown, by proper documents, to the court. The defendant is bound to make out and exhibit a clear and legal title. (4 *Rob. Adm. Rep.* 284. in note.)

Again, the vessel was either a regular prize, or taken by pirates. If taken by pirates, the property was not changed. (2 *Azuni*, 362. *Johns. Tran.*) If she was a prize, she ought to be regularly condemned in the court of the captors, and the purchaser should show his title under that condemnation. (*Doug.* 594. 1 *Rob. Adm. Rep.* 134.)

As to the amount of damages, the true rule is the value of the vessel at the time of the demand and refusal. If the defendant has laid out money in repairs, it was done at his peril, and the plaintiffs must acquire the benefit of them, by right of accession. (2 *Bl. Com.* 404.)

Harrison, contra. It is true, that where a person claims under a capture, he must show the condemnation. (*Abbott*, 8, 9, 10.) But here the property is not claimed by a right derived under a capture. The case does not proceed on the law of nations, or the *jus belli*, but on the law of a particular country. A sale by the sovereign of a country is always sufficient to change the property. It is enough, that, by the municipal laws of the country, the sale was so conducted as to transfer the property. Such a sale must be binding, and protect the purchaser in his possession. A *British* vessel was captured by the *Algerines*, and sold according to the practice at *Algiers*, and such sale was held to be valid in *England*. (*Helena*, 4 *Rob. Adm. Rep.* 3.) If a vessel wrecked or stranded on our coast, should be sold in order to prevent a total loss, such a sale would be valid; and should the purchaser, afterwards, repair her, and proceed to the port where the original owner resided, he *could not be divested of his property, by any claim of the former owner.

The *Spanish* consul declared that the proceedings were conformable to the laws of *Spain*, and that the written document held by the defendant was sufficient to transfer the property. This was confirmed by the testimony of the *American* consul at the *Havana*. If the owner or agent had appeared and claimed the vessel, the *Spanish* officer at *Barracoa* would, no doubt, have delivered her to him; but as no claimant appeared, he was perfectly justifiable in ordering her to be sold.

If, however, the plaintiff should be considered as entitled to recover, the rule of damages contended for by the plaintiff is wholly inadmissible. It may be applicable in some cases, *in odium spoliatoris*; but in the case of an innocent and *bona*

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fide purchaser, who has laid out his money and brought the vessel home, such a rule can never be endured. . Had the defendant libeled the vessel here for *salvage*, would he not be entitled to all the money expended for repairs, and to enable him to bring the vessel in safety to the *United States*? If the plaintiffs have had their property taken from them by pirates, they must seek their remedy against the pirates. If their vessel has been illegally captured, they must have recourse to the government for redress. The defendant, having acquired a fair title under the laws of *Spain*, has a right to retain the vessel against all the world.

THOMPSON, J., delivered the opinion of the court. The first question which this case presents is, whether the plaintiffs are entitled to recover; and the conclusion to which I have arrived on this point, will render it unnecessary for me to examine the second question made on the argument, which relates to the rule of damages.

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The capture of the vessel by the *French* privateer was no doubt illegal; and as the captors never brought the subject to a trial, nor obtained any judicial condemnation, but violently appropriated the vessel to their own use, the title of the plaintiffs was not lost by these irregular and piratical *proceedings. The only question is, whether the sale by the *Spanish* officer at *Barracoa* did not transfer the property to the defendant. The proceedings at *Barracoa* appear to have been fair and *bona fide*, both as to the sale and purchase; and if the sale was made pursuant to the laws of *Spain*, I think the plaintiffs are concluded by it. Whether the property so sold had been previously acquired by piracy, or otherwise, does not appear to me to be a material inquiry. Goods taken from pirates, and belonging to others, will, under the *English* law, be taken and sold by government, if the owner comes not within a reasonable time to vindicate his property. What that reasonable time shall be, every government will determine for itself. A sale according to the law of the place where the property is, must vest a title in the purchaser, which all foreign courts are bound, not only from comity, but on strong grounds of public utility, to recognize. Without this rule, there could be no safety in derivative titles. The only inquiry in these cases is, Was the sale under a competent authority? Here was a vessel brought into a *Spanish* port by *Frenchmen*. She appears in a feeble and dismantled condition. After two months, she is abandoned by her former possessors, who brought her there. She remains in that situation for several months, and is, at last, cast on shore. Then the public agent, and commissary of the port, caused her to be sold at auction, and the defendant became the purchaser. The weight of evidence is, that this proceeding of the officer was agreeable to the laws and

usages of *Spain* and her colonies, and I see no reason why a good title did not pass by the sale. This is not a case of prize, or title founded on capture. Such cases are governed by different rules, and must be tested by the law of nations. The sale in this case was a proceeding under a municipal regulation, and every government prescribes its own rules relative to wrecks, and property left derelict. By the *English* law, vessels cast on shore and abandoned, and not reclaimed within a year, are to be sold by a public officer, and the proceeds placed in the hands of the government. We *have a similar statute in this state, and I believe it was never doubted but that the purchaser would obtain a valid title, which would be every where respected. These sales are usually summary, and the presumption ought to be liberal in favor of their regularity and competency, when no doubt is raised as to the fairness and official nature of the transaction.

We are, accordingly, of opinion, that judgment must be given for the defendant.

Judgment for the defendant.

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JACKSON, *ex dem.* NORTON and BURT, *against* WILLARD.

THIS was an action of ejectment, for a house and lot in the village of *Cayuga*.

Upon the trial, the plaintiff gave in evidence a deed from *Robert R. Parkman* to *Norton*, one of the lessors, dated the 15th of *November*, 1805, a deed from *Norton* to *John Moffat*, dated 12th *May*, 1806, and a mortgage from *Moffat* to *Norton*, dated the same day, for securing the payment of 400 dollars, with interest. All these deeds were for the same premises. The defendant purchased the lot of *Moffat*, subject to the mortgage, and took possession in *June*, 1806. Six months' notice to quit had been duly given to the defendant.

The defendant gave in evidence the deed from *Moffat* to him, subject to the mortgage, dated 14th *June*, 1806: and also a judgment of the Supreme Court, signed the 14th *May*, 1806, against *Norton*, in favor of one *Larzelear*, an execution under the judgment, and a deed from the sheriff, dated 20th *May*,

Lands mortgaged cannot be sold on an execution against the mortgagee, before a foreclosure of the equity of redemption, tho' the debt be due, and the estate of the mortgagee has become absolute at law.†

† *Coles v. Coles*, 15 *Johns. Rep.* 319. *Van Rensselaer v. Sheriff of Albany*, 1 *Conn. Rep.* 511. *Denton v. Livingston*, 9 *Johns. Rep.* 96. *Bogert v. Perry*, 17 *Johns. Rep.* 351.

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1807, to the defendant, for the premises made in pursuance of a sale under the execution. At the time of the sale, the mortgage money was due, and the premises had become forfeited at law.

*The plaintiff offered to prove, that since the sale by the sheriff, the lot had been advertised by *Norton*, under the act concerning mortgages, and sold at vendue, and purchased by *Burt*, the other lessor, for 350 dollars, and a deed duly executed by *Norton* to *Burt*. This evidence was overruled, and, by the direction of the judge, a verdict was taken for the defendant.

The plaintiff moved to set aside the verdict,

1. Because the interest of a mortgagee cannot be sold on execution.

2. Because *Burt*, one of the lessors, was a *bona fide* purchaser at the sale under the power in the mortgage, without notice of the sale on the execution.

The cause was submitted to the court without argument, on the facts above stated.

KENT, Ch. J., delivered the opinion of the court. The validity of the defence, in this case, turns upon the proper solution of this question, viz. Whether the sheriff, on an execution, can sell lands mortgaged to the defendant in such execution, to secure the payment of a debt, if the sale be after the debt had become due, but before a foreclosure by the defendant, and while the mortgagor is suffered to retain possession.

This appears to be a new question, for we can find nothing like a decision of it in any of the books. Mortgages have been principally the subject of equity jurisdiction. They have been considered in those courts, in their true nature and genuine meaning; and the rules by which they are governed are settled upon clear and consistent principles. The case is far different in a court of law; and we are constantly embarrassed between the force of technical formalities, and the real sense of the contract. The language, however, of the modern cases, is tending to the same conclusions which have been adopted in equity; and, whenever the nature of the case would possibly admit of it, the courts of law have inclined to look upon a mortgage, not as an estate in fee, but as a mere security for a *debt. Lord *Hardwicke* said, in the case of *Richards v. Sims*, (*Barnard. Chan. Rep.* 90.) that the courts of law had then begun to consider mortgages in that light, and that a discharge of the debt, even by parol, was considered as a discharge of the mortgage; (a) so that, in an ejectment upon the mortgage, evidence that the debt was satisfied would defeat the estate in the land, which shows, he says, "that even the law considers the debt as the principal, and the land as an accident only." The real nature of a mortgage, in the equity sense of it, has been repeatedly recognized in the courts of law, since the time

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(a) *Lane v. Shears*, 1 *Wend. Rep.* 437. *Jackson v. Blodget*, 5 *Cow. Rep.* 203

of Lord *Hardwicke*; and it has been said, and repeated, that it was an affront to common sense, to say that a mortgagor in possession was not the real owner; that the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security. (2 Burr. 969. *Martin v. Mowlin*. Doug. 630. *The King v. St. Michaels*. Doug. 455. *Eaton v. Jacques*. 1 H. Bl. 117. note. *Chinney v. Blackburne*. Doug. 114. *Jackson v. Vernon*. 1 East, 238. *The King v. Inhab. of Edington*.)

Viewing the subject in this light, as I think I am well authorized to do in this case, I must conclude, that the interest of the mortgagee was not the subject of a sale on execution. At the time of the sale, the mortgaged premises continued to be real estate in the hands of the mortgagor, and liable to be sold on execution against him. (*Stewart v. Waters*, 1 *Caines's Cases in Error*, 47.) (a) Until foreclosure, or at least until possession taken, the mortgage remains in the light of a *chose in action*. It is but an incident attached to the debt, and, in reason and propriety, it cannot, and ought not, to be detached from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bond. *Accessorium non ducit, sed sequitur principale*. It is difficult to conceive what right can be sold which does not carry the debt with it. The control over the mortgaged premises *must essentially reside in him who holds the debt. It would be absurd in principle, and oppressive in practice, for the debt and the mortgage to be separated, and placed in different and independent hands. There is no way to render a mortgage vendible, but by allowing the debt to go with it; and this would be repugnant to all rule, for it is well understood, that a *chose in action* is not the subject of sale on execution. When the mortgagee has taken possession of the land, the rents and profits may, perhaps, then become the subject of computation and sale. Until then, the attempt would be useless. Even in cases where a mortgagee makes a voluntary assignment of both debt and mortgage, Lord *Loughborough* (4 *Vesey*, 127.) held it to be very indifferent security, unless done with the privity of the mortgagor, because the assignee would take subject to the account between the mortgagor and mortgagee. But to attempt to sell the mortgage alone, without the debt, and that,

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(a) An equity of redemption may be sold on an execution at law in *New-York*, *Waters v. Stewart*, 1 *Caines's Ca.* 47; in *Connecticut*, *Hobart v. Frisbie*, 2 *Conn. Rep.* 592; in *Massachusetts*, *Ingersoll v. Sawyer*, 2 *Pick. Rep.* 276. *Carpen-ter v. Sutton*, 7 *Pick. Rep.* 49; and in *Maryland*, *Ford v. Philpot*, 5 *Harr. and Johns.* 312; but not (seem) in *New-Hampshire*, 2 *N. Hamp. Rep.* 16. In *Pennsylvania*, a judgment is a lien upon any kind of equitable interest in land vested in the debtor at the time of judgment, and any such interest may be sold on an execution. *Carkhuff v. Anderson*, 2 *Binn. Rep.* 4.

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too, before foreclosure or possession, appears to me, in every point of view, to be extremely unfit, and equally inadmissible as it would be to sell the bond of the mortgagee.

We are, accordingly, of opinion, that the sale in the present case by the sheriff, and the purchase under it by the defendant, were null and void, and, consequently, that the plaintiff is entitled to recover; and that the evidence, also, of the sale under the power in the mortgage ought to have been received. The verdict ought, therefore, to be set aside, and a new trial awarded, with costs to abide the event of the suit.

New trial granted. (a)

(a) The mortgagor is considered in *New-York* as the owner of the freehold, notwithstanding the mortgage, and may even sustain an action of trespass against the mortgagee, or those claiming under him, if he or they enter while the mortgagor is in possession. *Jackson v. Bronson*, 19 *Johns.* 325. *Dickenson v. Jackson*, 6 *Cow. Rep.* 147. And, subject to the mortgage, the widow of the mortgagor is entitled to her dower. *Tabele v. Tabele*, 1 *Johns. Cha. Rep.* 45. Before foreclosure, the mortgagor remains seized of the freehold, and the mortgagee has merely a chattel interest, a pledge for his debt. *Wilson v. Troup*, 2 *Cow. Rep.* 195. *Huntington v. Smith*, 4 *Conn. Rep.* 235. *Clark v. Beach*, 6 *Conn. Rep.* 142. *Willington v. Gale*, 7 *Mass. Rep.* 138. *Eaton v. Whiting*, 3 *Pick. Rep.* 484. *Blaney v. Bearce*, 2 *Greenl. Rep.* 132. *McCall v. Lennox*, 9 *Serg. and Rawle*, 302. *Schuylkill Nav. Co. v. Thoburn*, 7 *Serg. and Rawle*, 411. *Ford v. Philpot*, 5 *Harr. and Johns. Rep.* 312.

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*TILLMAN against LANSING, Sheriff of Rensselaer County.

THIS was an action of *debt*, for a *voluntary escape*. The cause was tried at the *Albany* circuit, in *April*, 1808, when a verdict was found for the plaintiff, subject to the opinion of the court on the following case.

In *May* term, 1807, the plaintiff obtained a judgment in this court, against *Joseph B. Comstock* and *Samuel Comstock*, for 200 dollars, debt, and 8 dollars and 88 cents, costs. On the 11th *May*, a *ca. sa.* was issued against them upon the judgment, returnable in *August* following, on which they were taken by the sheriff of *Rensselaer* county, and held in his custody. The prisoners gave security to the sheriff for the *liberties* of the prison, and were in custody within the *limits* of the prison. On *Sunday*, the 8th *November*, 1807, before the commencement of this suit, both the prisoners were at church in *Lansingburgh*, about three miles without the limits of the prison, where they were seen by a deputy-sheriff, who resided in the same house with the sheriff. On the preceding *Sunday*, one of them had been seen by the sheriff himself, without the limits; and it appeared that they were in the habit of going out of the prison limits on *Sundays*, to attend church at *Lansingburgh*; but always returned within the limits, on the same day, and this was known to the sheriff; that they never left the limits at any other time, except on *Sundays*, and were still in custody within the limits, when the present suit was commenced.

It was agreed, that if the court should be of opinion that the sheriff was liable for an escape, then a judgment was to be entered for the plaintiff, otherwise a nonsuit was to be entered.

Allen, for the plaintiff. 1. This is a voluntary escape, for which the sheriff is liable. A voluntary escape is where *the prisoner is suffered to go at large, by the consent or permission of the officer. This consent may be implied as well as express: as where the prisoner is intrusted with the keys of his prison, or is made turnkey, and goes out and returns; (*Impey's Sheriff*, 199, 200. *Cases temp. Hardw.* 310, 311.) or where a prisoner in execution is permitted to go about attended by a follower. (1 *Bos. & Pull.* 24.) So if a prisoner goes without the liberties or rules of prison, with the knowledge of the sheriff, it is a voluntary escape. (*Impey's Sheriff*, 204. 2 *Term Rep.* 126.) If the defendant, who has been taken in execution, is seen at large, even before the return of the writ, and for the shortest time, it is an escape. (2 *W. Bl. Rep.* 1048.) Where there has been a voluntary escape, there can be no recaption. (3 *Term Rep.* 392.)

2. If this is not a voluntary escape, still it is such an escape

Where a prisoner in execution, on giving security to the sheriff, was allowed the liberties of the gaol, and went beyond the limits, on *Sundays*, returning again in the evening, it was held, that the sheriff had no power to restrain the prisoner after he had given the security required by the statute, and that, though this was neither a *voluntary* nor *negligent* escape, yet it was such an escape under the statute relative to gaol liberties, as could not be purged by a voluntary return of the prisoner before a suit brought, and rendered the sheriff liable in the first instance, and that he must resort to the bail for his indemnity, as the bond was

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not made assignable.

† See *Middle District Bank v. Deyo*, 6 *Conn. Rep.* 739, and the cases there cited

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under the statute, as renders the sheriff liable. By the 18th and 20th sections of the act (*Rev. Laws*, v. 1. p. 212. 1 *N. R. L.* 425, 426. s. 19. 21.) concerning sheriffs, &c., if any person arrested or committed to prison on execution, be suffered to go out of prison or be at large, without the consent of the plaintiff, it is declared to be an escape, and the plaintiff may recover the amount of the execution, by an action of debt against the sheriff. By the 5th and 6th sections of the act relative to gaols, (*Rev. Laws*, v. 1. p. 359, 360. 1 *N. R. L.* 429.) in which the liberties are regulated, it is expressly provided, that nothing in the act should be construed to exonerate the sheriffs, in case the prisoners shall escape or go at large without the limits established for the liberties of the gaol. (a) The liberties are nothing more than the extension of the four walls of the prison, and the doctrine as to escapes applies now, as well as before the establishment of liberties. The law, while it is very strict against sheriffs, has provided for their security and indemnity. A sheriff is not obliged to permit a prisoner to go within the liberties, until he has executed a bond, with sufficient sureties, that he will not escape or go beyond the limits; and if the sheriff, at any time, should discover the security he has taken to be insufficient, he may confine the prisoner in close custody, until he gives further and sufficient bail.

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Van Vechten, contra. The only question is, whether there was a voluntary escape. If the sheriff had no power to *refuse the liberties of the gaol to the prisoner, on his tendering a sufficient bond of indemnity, nor to put the prisoner into close custody because he transgressed the limits, then the sheriff ought not to be made liable unless he knows of and connives at the escape. The statute is imperative on the sheriff; and he cannot refuse the liberties to a prisoner who offers a sufficient security. If the sheriff is to be held liable for a *voluntary* escape, then he cannot resort to his bond of indemnity; and by the present form of action he would be deprived of the benefit of a security which the statute obliges him to accept. If the plaintiff meant to recover by virtue of the statute, he should have brought a special action founded on the statute, so that the record of recovery would be evidence in support of an action by the sheriff on his bond. But the action being for a voluntary escape at common law, the plaintiff cannot recover under any of the provisions of the statute. If there has not been a voluntary escape, then the common law doctrine of a recaption will apply, and the prisoner having returned into custody before any action was brought, the present suit cannot be maintained. It was so decided in *Dole v. Moulton*, in 1801. It is unnecessary to examine the doctrine of escapes. It is enough that the sheriff was obliged to suffer the prisoner to be at large within

the liberties, on his giving bail; and, having no control over him while that security was sufficient, he ought not to be made liable for a voluntary escape.

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THOMPSON, J., delivered the opinion of the court. The general principles of law applicable to *escapes* are well settled; and if the present case was to be decided, independently of our statute relative to gaol-liberties, little difficulty would be presented. It is not to be denied, that fresh pursuit and recaption before action brought, is a good defence against a *negligent escape*; and a voluntary return of the prisoner before action commenced, will also purge an escape of this description. (*Impey's Shff.* 181. 188. *Stra.* 423.) It is equally well settled, that there can be no recaption *after a voluntary *escape*, and that nothing will purge an escape falling under that denomination. (3 *Term Rep.* 392. 2 *Wil.* 294.) It does not, however, appear to me that this can be considered, technically, either as a voluntary or a negligent escape. An escape is not voluntary, unless it be with the consent, or by the default of the sheriff, (2 *Term Rep.* 131.) neither of which is imputable to the sheriff in the present case: for the statute (*Rev. Laws*, v. 1. p. 360.) is mandatory upon him, to permit the prisoner to go at large, provided he gives the security therein required. After giving the security, the sheriff has no right to restrain the prisoner, unless he shall discover his bail to be insufficient, and in such case, no longer than until good bail be offered. A negligent escape necessarily implies some neglect of duty or default in the sheriff. Nothing of this kind, however, is chargeable upon him in the case before us, unless he had a right by force to restrain the prisoners from going beyond the gaol-liberties. And if any such power be vested in the sheriff, his neglect and default would approach very nearly to a voluntary escape. The prisoners were in the constant habit of going beyond the limits, on *Sundays*, and this was known to the sheriff, and one of them was seen by him three miles without the liberties, and no notice taken of it. According to my view of the case, however, the sheriff is chargeable with no default, on this account, because he had no right to restrain them. That there has been an escape, can admit of no doubt; but, as I before observed, it is not either a voluntary or negligent escape, within the ordinary acceptation of the terms; but an escape which, under our statute, amounts to a breach of the condition of the prisoners' bond, and renders the sheriff responsible.

The act of the 20th of *March*, 1801, (*Rev. Laws*, v. 1. p. 212.) directs, that every person who shall be arrested by

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virtue of an execution against his body, shall be kept in prison, in close and secure custody; and if the sheriff shall permit such person to go out of prison, *or be at large*, *without the assent of the plaintiff, he shall be answerable for the debt for which such person was arrested or committed: And it is declared to be an escape for the sheriff to *permit* or *suffer* a prisoner in custody on execution, to go, or be at large out of his prison. Under this statute, what kind of an escape would it be, if a sheriff, seeing a prisoner at large, should *suffer* him to remain without recommitting him? It could scarcely be denominated any other than a voluntary escape: Although he might not have expressly assented to his going at large, at first, yet, by voluntarily suffering him to remain at large, he thereby assents to and ratifies the original escape. The act of the 30th March, 1801, (*Rev. Laws*, v. 1. p. 360.) makes it the duty of the sheriff to allow prisoners the liberties of the gaol, on their giving a bond with sufficient sureties, the condition of which bond is, "that such prisoner shall remain a true and faithful prisoner, and shall not at any time nor in any wise escape, *or go* without the limits of the liberties of the prison, until discharged by due course of law." And the sheriff is authorized, in case he shall discover the bail to be insufficient, to confine the prisoner, until other sufficient bail be offered.

According to my construction of this act, the sheriff, after having taken bail, has no right to restrain the prisoner, should he see him at large; his remedy is upon his bond. It is a breach of the condition of this bond, for the prisoner to go beyond the limits, and it can be no defence to him that he returned before suit brought against the sheriff. This bond, it is true, is for the sheriff's indemnity only. Nothing more, however, is to be understood by this, than that if the plaintiff in the execution does not choose to take advantage of this escape, the sheriff shall not. The bond is not made assignable; the plaintiff's remedy must, therefore, be, in the first instance, against the sheriff. The act provides, that nothing therein contained shall be construed to exonerate the sheriff, in case the prisoner shall escape and go at large without the limits. Were it not, *then, for this act, how would the sheriff stand under the statement of facts in the case? He knew that the prisoners were in the constant habit of going beyond the limits, saw one of them without the same, and suffered him to remain there, without attempting to recommit him. If he was legally vested with this power, I should strongly incline to think his neglecting to exercise it, would amount to a voluntary escape; but it is unnecessary to go thus far. That here has been an escape in fact, is not denied; and I am satisfied that, according to the true construction of the statute, there

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could be no recaption, and that a voluntary return of the prisoner before suit brought, will not purge the escape.

The case of *Dole v. Moulton*, decided in this court in *January* term, 1801, was relied upon by the defendant's counsel, but has no application to the case. That was a suit by the sheriff upon a bond for the gaol-liberties, and the defendant pleaded specially, "that he accidentally walked sixteen feet beyond the gaol-liberties, which were bounded on an imaginary line, and that he immediately and voluntarily returned, and there had remained, and which return was before suit brought." To the plea there was a demurrer, and the court held the plea to be good, because the bond was given for the sheriff's indemnity, and he could not have sustained any damage in that case, as the escape was involuntary on the part of the prisoner, and such an *involuntary* escape, and return before suit brought, would be a good defence in a suit against the sheriff for the escape. The plea was held to be equivalent to a plea of *non damnificatus*. The case of *Currie and Whitney v. Henry*, (2 *Johns. Rep.* 433.) is also inapplicable. That was a suit against the defendant, as sheriff, for an escape, and the plea was an escape with force, and breaking of the gaol, and against the will of the sheriff, and a return into custody before suit brought. That case did not arise under the statute for creating gaol-liberties. This case is also essentially distinguishable from that of *Bonafous v. Walker*, (2 *Term Rep.* 126.) where it was held, that an escape from *the King's Bench prison, without the marshal's knowledge, was not a voluntary escape, and that a recaption on the fresh pursuit was a good plea. In that case, the prisoner, upon his return, was confined immediately in close custody, and denied the rules of the prison, and that fact was relied upon by one of the judges, as evidence that the escape was not voluntary on the part of the marshal. It was a material ingredient in that case, which does not nor could it legally exist in the one before us, because the sheriff has no power to deprive the prisoners of the gaol-liberties, notwithstanding a previous escape, so long as they can furnish him a bond with sufficient sureties.

Making sheriffs responsible in such cases may seem to operate hardly, if they should be compelled to advance the money, before they have an opportunity of prosecuting the security they may have taken. It is a circuitous mode of getting at the security; but the statute has made this course necessary, since the bond taken by the sheriff is not made assignable. We incline, however, to think that the court would have power to stay execution against the sheriff, for the purpose of giving him a reasonable time to prosecute his bond. But

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the hardship of the case cannot vary the construction of the statute; the alteration, if any be necessary, belongs to another forum. The opinion of the court, therefore, is, that the plaintiff must have judgment. We have taken no notice of the objection suggested on the argument, as to the form of the action. This we consider waived by the agreement at the foot of the case.

Judgment for the plaintiff. (a)

(a) "The going at large of any prisoner who shall have executed such bond, or of any prisoner who would be entitled to the liberties of any jail upon executing such bond within the liberties of the jail of the county in which he shall be in custody, shall not be deemed an escape of such prisoner; but in case any such prisoner shall go at large without the liberties of such county, without the assent of the party at whose suit such prisoner shall be in custody, the same shall be deemed an escape and forfeiture of the bond so executed: and the sheriff, in whose custody such prisoner shall have been, shall have the same authority to pursue and retake such prisoner, as if such escape had been made from the jail. In every suit brought by a sheriff on such bond, the defendant may plead a voluntary return of the prisoner to the jail from which he escaped, or the liberties thereof, or a recaption of such prisoner by the sheriff from whose custody he escaped, before the commencement of such suit, and may give evidence thereof in bar of such action; and such defendants shall be entitled to make such or any other defence to such suit, which might be made by such sheriff, to an action against him for such escape." 2 *Rev. Statutes*, p. 434, 435. sect. 47, 48.

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*FENTON against REED.

An actual marriage may be inferred, in ordinary cases, from cohabitation, acknowledgment of the parties, &c. No formal solemnization of marriage is requisite. A contract of marriage, made *per verba de presenti*, is as valid, as if made *in facie ecclesie*.

THIS case came before the court, on a *certiorari* from the Justices' Court in *New-York*.

It appeared, upon the trial below, that *Reed*, the plaintiff below, demanded a certain annual payment of 25 dollars, secured by the constitution of the Provident Society, to the widows of deceased members of that society. *William Reed*, whose widow the plaintiff below claimed to be, was a regular member of the society, at the time of his decease. By the constitution of the society, the widows of regular members were entitled to 25 dollars, annually, from the funds thereof. The only point in controversy was, whether the plaintiff was the widow of *Reed*. In the year 1785, she was the lawful wife of *John Guest*. Some time in that year, *Guest* left the state for foreign parts, and continued absent, until some time

in the year 1792, and it was reported, and generally believed, that he had died in foreign parts. The plaintiff, in 1792, married *Reed*. In that year, and subsequent to the marriage, *Guest* returned to this state, and continued to reside therein until *June*, 1800, when he died. He did not object to the connection between the plaintiff and *Reed*, and said that he had no claim upon her, and never interfered to disturb the harmony between them. After the death of *Guest*, the plaintiff continued to cohabit with *Reed* until his death in *September*, 1806, and sustained a good reputation in society; but no solemnization of marriage was proved to have taken place between the plaintiff and *Reed*, subsequent to the death of *Guest*.

Upon these facts, the court below decided, that the marriage with *Reed* was not meretricious or void, and that the plaintiff was entitled to the annuity.

The plaintiff in error contended, that the statute concerning bigamy only purged the felony, and did not legalize the marriage with *Reed*, which, after the return of *Guest*, was *meretricious; that though the subsequent cohabitation with *Reed*, as his wife, after *Guest's* death, was sufficient to charge him with her debts, as her husband; yet that, when the wife comes and claims a right, *quasi* wife or widow, she must prove a marriage *in fact*, and that the continuance of cohabitation was not sufficient.

The defendant in error insisted, that the statute concerning bigamy frees her from guilt, and that her subsequent cohabitation with *Reed* was not meretricious.

On the facts and the points above stated, the case was submitted to the court without argument.

Per Curiam. The marriage of the plaintiff below with *William Reed* during the life-time of her husband *John Guest*, was null and void. It was of no legal avail whatever, and not sufficient to constitute them husband and wife *de facto*. This has been the uniform and well-settled rule of the common law. (1 *Roll. Abr.* 340. pl. 2. 357. pl. 40. 360. *F. Cro. Eliz.* 858. 1 *Salk.* 120.) The statute concerning bigamy does not render the second marriage legal, notwithstanding the former husband or wife may have been absent above five years, and not heard of. It only declares, that the party who marries again, in consequence of such absence of the former partner, shall be exempted from the operation of the statute, and leaves the question on the validity of the second marriage just where it found it. *Elizabeth Reed* was, then, the lawful wife of *Guest*, and continued so, until his death in 1800; and the true question is, whether there was evidence sufficient to justify the court below in concluding that she was afterwards married to *Reed*. Though the court below may have decided upon erro-

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neous grounds, yet if upon the return there appears to be other and sufficient reasons to justify their decision, the judgment ought to be affirmed. It is stated, that there was not proof of any subsequent marriage *in fact*, and that no solemnization of marriage was shown to have taken place. But proof of an actual marriage was not necessary. Such strict proof is only required in prosecutions *for bigamy, and in actions for criminal conversation. (4 Burr. 2057. Doug. 171.) A marriage may be proved, in other cases, from cohabitation, reputation, acknowledgment of the parties, reception in the family, and other circumstances from which a marriage may be inferred. (4 Burr. 2057. 1 Esp. Cases, 213. 2 Bl. Rep. 877. Peake's Cases, N. P. 231.) No formal solemnization of marriage was requisite. A contract of marriage made *per verba de presenti* amounts to an actual marriage, and is as valid as if made *in facie ecclesiæ*. (a) (6 Mod. 155. 2 Salk. 437. Peake's Cases, 231.) In the present case, there existed strong circumstances, from which a marriage subsequent to the death of *Guest* might be presumed. The parties cohabited together as husband and wife, and under the reputation and understanding that they were such, from 1800 to 1806, when *Reed* died; and the wife, during this time, sustained a good character in society. A jury would have been warranted, under the circumstances of this case, to have inferred an actual marriage, and the court below had sufficient ground to draw that conclusion; and as they have drawn it, and their decision being a substitute for a verdict, we will not disturb it.

Judgment affirmed.

(a) See *Hantz v. Seely*, 6 Binn. 405, where it was held, that marriage is a civil contract, which may be completed by any words in the present time without regard to form; and where the distinction between words constituting such a marriage, and words of reference to a past cohabitation are considered.

See also, as to marriages by contract, without religious celebration, in *Scotland*, and the evidence by which they may be sustained, *Dalrymple v. Dalrymple*, 2 Haggard's Cons. Rep. 54.

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THIS was an action of *trover*, for a brig called the *America*. The cause was tried at the sittings in *New-York*, the 19th of *April* last, before the *chief justice*. The vessel had been attached on the 1st *March*, 1805, by the *defendant, then sheriff of the city and county of *New-York*, by virtue of a warrant of attachment issued by one of the judges of this court, against the estate of *Evans*, an absent debtor, pursuant to the act giving relief against absconding and absent debtors. The plaintiffs were appointed trustees for all the creditors.

The plaintiffs proved, by the custom-house books, that the vessel was registered in the name of *Evans*, on the 16th *May*, 1804, and that no alteration had been made in the register at the time of the attachment, nor until the 1st *March*, 1807. They also proved a demand of the brig prior to the commencement of the suit, and a refusal by the defendant to deliver, and the value of the vessel at the time.

The defendant's counsel then moved for a nonsuit,

1. Because there was no evidence of an actual conversion, and that the demand and refusal were no evidence of a conversion, unless the defendant was in possession of the thing at the time.

2. Because the action of *trover* would not lie; but the plaintiff should have brought an action on the case against the defendant for misbehavior in his office of sheriff.

These objections were overruled by the judge; and the defendant then produced a bill of sale of the vessel, dated at *Portsmouth*, in *New-Hampshire*, the 24th *July*, 1804, from *Evans* to *Peter Coffin*, *John Haven*, and *Edward I. Long*, for the consideration of 4,000 dollars, which recited the register, and the execution was duly proved and certified by a notary public. It appeared, that the bill of sale had been delivered to the vendees therein named, to indemnify them for certain notes, amounting to 2,224 dollars and 44 cents, lent to *Evans*, and which were paid by them, when they became due. When the bill of sale was executed, the vessel was absent on a foreign voyage, and did not come into any port of the *United States*, until she arrived in *New-York*. A few days before the attachment was levied by the defendant, and as soon as the vendees heard of her arrival in *New-York*, they directed their agent to take possession *of her, as their property. Soon after the attachment was levied, they put in a claim of property, which was tried before a jury summoned for that purpose,

A bill of sale of a ship, containing blanks for the recital

[* 55] of the register, was executed and delivered, and afterwards the blanks were filled up by the consent of the vendor and vendee. It was held, that the bill of sale was good, and that a deed, after it has been executed, may be altered in a material part, with the consent of the parties, with out affecting its validity.†

† *Ex parte Keweenaw*, 8 *Conn. Rep.* 118. See *Ex parte Dicker*, 6 *Conn. Rep.* 54.

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by the defendant; but after hearing the proofs and allegations of the parties, the jury separated, without coming to a decision. The defendant, on receiving a bond of indemnity from the claimants, delivered the vessel up to them, and she soon after sailed for *Portsmouth*, her register still remaining unaltered. It appeared, that all that part of the bill of sale to *Coffin, Haven, and Long*, which contains a recital of the certificate of registry, was in blank, at the time it was produced to the sheriff's jury; that the same bill of sale was produced at the trial of the cause, and the blank was then filled up, by inserting the certificate of registry.

The judge charged the jury, that the grantee or vendee of a deed or written instrument could not, after its execution, alter it, even in an immaterial part, without destroying its validity; but that an alteration in an immaterial part, with the consent of the grantor or vendor, would not vitiate the instrument; that it was not requisite, for the purpose of transferring the property in a vessel, that the certificate of registry should be recited in the bill of sale; that in this action, which was merely to try the right of property, the insertion or omission of the recital was immaterial; and he left it to the jury to decide, whether the alteration of the bill of sale, by inserting the recital, was made by the vendees, with or without the consent of the vendor; and if made without his consent, that they should find a verdict for the plaintiffs; but if it was made with the consent of the vendor, that then they should find a verdict for the defendant. The jury found a verdict for the defendant.

A motion was made to set aside the verdict.

Brinkerhoff, for the plaintiff. Any alteration of a written instrument, after it has been executed, even in an immaterial part, renders the instrument void. (*Pigot's case*, 11 Co. 27. 4 Term Rep. 329. *Shep. Touch.* 69, 70, 71.) And it was decided, in *Facman's case*, (2 Roll. Abr. 29. (U.) pl. 5.) that a bond, altered by consent of both parties, was void. But admitting that an alteration *might be made by consent of both parties, still it cannot be done, if the rights of third persons will be prejudiced by such alteration; and here the rights of the plaintiff, under the attachment, are affected, for the alteration was made after the writ of attachment was served.

By the act of Congress, (*Laws of the U. S.* vol. II. p. 131. § 14.) whenever a vessel is sold, she must be registered anew, and if the register is not recited in the bill of sale, the vessel loses her *American* character, and is obliged to pay duties as a foreign vessel. The insertion of the registry, therefore, was a material alteration, and for the benefit of the defendant.

Wells, contra. The bill of sale, without a recital of the registry, was sufficient to transfer the property in the vessel. If the justice of the case is, therefore, with the plaintiff, the court will not lightly disturb the verdict, (2 *Term Rep.* 4.) nor will they send back the cause on a mere technical objection, or nice point of law. (2 *Salk.* 646. 4 *Term Rep.* 468.)

It is true, that a grantee can make no alteration whatever in a deed. The rule is founded on a wise caution, and in good policy; but the reason of it does not apply, where both parties consent to make the alteration, and especially in an immaterial part. If the property passes by a bill of sale, that does not recite the register, then the filling up the blanks, or inserting the register, was not material. For, as this is a mere question of property, the effect of the omission or insertion of the register on the character of the vessel, cannot alter the case. An alteration by the obligor in a deed in a material part, does not avoid it. (*Comyn, Fait*, F. 1.) In the case of *Markham v. Gomaston*, (*Moore*, 547. But see *Cro. Eliz.* 626. *contra.*) where blanks were left in a bond, which were filled up by the consent of the parties, the deed was held to be good; and in *Zouch v. Claye*, (2 *Lev.* 35. 1 *Vent.* 185. 2 *Ch. Rep.* 410. *Paget v. Paget.*) the whole court held, that an alteration by consent of parties did not make a deed void; and the decision in *Markham v. Gomaston*, as reported by *Moore*, was recognized as correct, though a contrary decision appears in *Cro. Elizabeth*. The *case in 2 *Roll. Abr.* 29. pl. 5. is said by Lord *Kenyon*, (4 *Term Rep.* 323. 1 *Anst.* 228. S. C.) to have been overruled since, and is certainly inconsistent with the decisions in *Moore* and *Levinz*.

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D. B. Ogden, in reply, observed, that, as the insertion of the register affected the character of the vessel, it was material; and if material for any purpose, it must be considered as material to every purpose. The position of Baron *Comyn* is not warranted by *Pigot's* case, to which he refers as an authority, but the very contrary is stated by *Coke*. In none of the cases cited does it appear, that the alterations were made after the deed had been delivered; and if after execution, and before the delivery, then the alterations were made before the deed took effect. In *Zouch v. Claye*, after A. and B. had executed a bond, the name of D., a third obligor, was inserted by consent, who also executed the obligation; and the question was, whether this alteration made the bond void against A. and B. In the present case, a blank deed was executed and delivered, and afterwards filled up by the grantor's consent; a much stronger case than any which have been cited.

THOMPSON, J., delivered the opinion of the court. The first objection raised on the part of the plaintiff, against the validity

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ty of the transfer of property in the brig *America*, by *Evans*, the absent debtor, to *Coffin* and others, is, that the bill of sale was originally void, because the grand bill of sale was not delivered as a substitute for the possession of the brig. This objection was, however, abandoned during the argument, on the ground that (if amounting to any thing) it ought to have been raised at the trial. The real and only point, then, before us, is, whether the filling up of the blank left in the bill of sale, for the certificate of registry, rendered the bill of sale void. The jury have found that the blank was filled up with the consent of *Evans*, the vendor. The testimony upon which that finding was grounded, is not stated in the case; we are, therefore, to take it for granted, that that fact is not controverted, and *are, of course, relieved from any inquiry how far such an act could have been permitted without the consent of the vendor. Neither is it requisite to examine whether the filling up of this blank made a *material* alteration in the deed, because I think it can be maintained that a deed may be altered in a *material* part with the consent of both parties. It is difficult to perceive any objection to this, since the temptations to abuse and fraud, which would be felt, if such alterations were allowed by one party only, do not exist.

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In 2 *Roll. Abr.* 29. (U.) pl. 5. it is, however, stated, that if a material alteration be made in a deed by the obligor, with the consent of the obligee, it is still void; and for this, *Facman's* case in the C. P. is cited. But when this case was cited in *Muster v. Miller*, (4 *Term Rep.* 323.) Lord *Kenyon* said that there had been contrary decisions since; and in *Markham v. Gomaston*, as reported in *Moore*, 547. a subsequent and contrary decision is stated to have been made in the K. B. A bond was given, containing a recital of a former bond or recognizance, against which the one then in question was taken by way of indemnity. The former bond was recited with a blank for the Christian name and addition of the obligee, and this blank was afterwards filled up. In a suit upon the bond of indemnity, this matter was specially pleaded, and the plaintiff replied, that the blank was filled up with the assent of the obligor, and, upon demurrer, judgment was given for the plaintiff. That is a case very analogous, and, indeed, in point; for it will be admitted that the blanks in that case were material.

In the case of *Zouch v. Claye*, (2 *Lev.* 35.) this decision in *Moore* is cited by Sir *M. Hale* and the whole court, as correctly reported; and the court there established the doctrine, that an alteration in a bond, in a material part, by consent of all parties, did not vitiate the instrument. I am aware that the brief, and sometimes contradictory manner of stating the case and decision, in the old reports, renders their authority less conclusive than it would otherwise *be; and this remark ap-

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plies to the case of *Markham v. Gomaston*, as being reported with considerable variation in *Moore and Croke*, (*Cro. Eliz.* 626.) But Lord Chief Baron *Comyn* understood the decision in *Levinz*, as being a direct and full authority on the point before us, and so he gives it in his *Digest*. (Vol. 4. p. 169.) A decision took place before Lord *Mansfield*, in *Texira v. Evans*, which is also in favor of the validity of such an alteration. The case is stated by *Wilson, J.*, in the Exchequer Chamber, in 1 *Anst.* 228. A bond was executed with blanks for the name and sum, and delivered by the obligor to an agent for the purpose of raising money; the plaintiff lent a sum, and the agent accordingly filled up the blanks with that sum and the plaintiff's name, and delivered the bond to him, and on *non est factum* pleaded, the bond was held good.

As between the parties themselves, I cannot discover any well-founded objection to this rule. If the interests of third persons had in the mean time attached, perhaps a deed so altered ought not to have relation back to the time of its execution. But that was not the case here. The bill of sale was perfectly competent, with the blank in it, to pass the property of *Evans*; and all that has been contended on the part of the plaintiffs is, that the insertion of the certificate of registry gave the vendees some additional privileges in the enjoyment of the vessel. But the property still had vested in them, even without the enjoyment of those privileges. *Evans* had no interest left in the vessel which could be attached.

The opinion of the court, therefore, is, that the motion for a new trial must be denied.

Rule refused.

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P. devised lands to his daughter C., "during the term of her life, and immediately after her death, unto and among all and every such child and children as the said C. shall have lawfully begotten at the time of her death, in fee simple, equally to be divided between them, share and share alike." It was held, that the four children of C., who were living at the time of the devise, and at the death of the testator, took a vested remainder in fee, and that in case there had been any children born afterwards, the estate would have opened for their benefit; and that the children of a daughter of C., who died in the life-time of her mother, were, therefore, entitled to the share of C., who was living at the death of the testator.

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THIS was an action of ejectment brought to recover the undivided one fourth part of a house and lot in the first ward of the city of *New-York*. The cause was tried at the last sittings, and a verdict taken for the plaintiff, subject to the opinion of the court, upon the following case:

Peter Praa was seised in fee of the premises, and by his will, dated 5th *August*, 1739, devised as follows: "I devise to my daughter, *Christiana Provoost*, the dwelling-house and ground she now lives on, to hold the said house and ground for and during the term of her life; and immediately after her death, I give the same unto and among all and every such child and children as the said *Christiana* shall have lawfully begotten, at the time of her death, in fee simple, equally to be divided between them, share and share alike."

It was admitted that the house and ground mentioned in the devise were the premises in question, and that the defendants were in possession.

It was proved, that under the devise, *Christiana* continued in possession until her death in 1798, leaving *Jonathan Provoost* her only surviving child, the father of the defendants, and that at her death, *Jonathan* entered into the possession of the premises, and remained in possession about eight years, and until his death; and that he, by his last will, specifically bequeathed the premises to his heirs, who entered under it at his death. *Christiana* had four children by her husband, *David Provoost*, at the time of the will, and at the death of *Peter Praa*; and one of them, *Catharine*, died intestate before her mother, leaving the lessors of the plaintiff her heirs at law.

Upon this case, the point raised by the plaintiff was, that all the children of *Christiana* were entitled to a proportional part of the premises, and that their representatives are now entitled to it, although some of the children died before *Christiana*.

D. B. Ogden, for the plaintiff. The children of *Christiana Provoost*, who were living at the death of *Peter Praa*, took a vested remainder. This is the natural and obvious construction of the will, and the only one consistent with the evident intent of the testator. The testator gives to all the children and to each child its proportional part. He meant to provide for *C. Provoost* and her issue; and all her children, whether living or not, would take at her death, the remainder being vested at the death of the testator.

In the case of *Wimple v. Fonda*, (2 *Johs. Rep.* 288.) such a devise was held to create a vested remainder.

In the case of *Cook v. Cook*, (2 *Vern.* 545.) it was decided that the words 'begotten,' and 'to be begotten,' are to be construed the same, and that though there was only one child living at the death of the testator, the estate should open and take in an after-born son.

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T. A. Emmet, contra. The question is, whether there was a vested or a contingent remainder. It was, no doubt, the intention of the testator, to provide for any after-born children of *C. Provoost*. Where there is any person, *in esse*, capable of taking, the estate will vest, and open again as to the children after-born; and where a contingent remainder is limited to several persons, it will vest in the person first becoming capable of taking, and open again as to any persons becoming capable during the continuance of the particular estate. (*Cruise's Dig.* Tit. 16. c. 5. § 11. Yet if a man devise land to the children of *I. S.*, no children born after the death of the testator can take. (*Shep. Touch.* 418. (436.) In the case of *Wimple v. Fonda*, there was a person *in esse*, capable of taking at the time of the devise. Where a person devised land to his son for life, and after his death, to his son's children, this was held to be a contingent remainder in fee. (*Goodright v. Dunham*, *Doug.* 264.) The uncertainty of the words of description will *make a remainder, contingent. Here the word 'children' is itself uncertain, and that uncertainty is increased by the words "lawfully begotten at the time of her death." (2 *Bos. & Pull.* 289. *Cro. Eliz.* 630.) It was not the intention of the testator to provide for grandchildren; and grandchildren cannot take where there are children capable of taking at the time. (2 *Vern.* 107.) The words lawfully begotten necessarily qualify the word children. They are intended to exclude illegitimate children, and the true sense and construction is, such lawfully begotten children as *C. Provoost* shall have at the time of her death. The use of the words, 'all and every such child and children,' evidently shows that the testator not only meant such children as should be living at the time of his death, but that he had in view a possible survivorship among the children.

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VAN NESS, J. That the construction given to the clause of the will by the counsel for the plaintiff, accords with the intention of the testator, can hardly be doubted; and the only question is, whether he has made use of sufficient words to effectuate his intent.

It is a rule in the construction of wills, particularly of those inartificially and obscurely drawn, to advert, in order to discover the intention of the testator, to his situation at the time of

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making the will, as to the number of his children, the different kinds of property of which he was seised, &c. (6 *Cru. Dig.* 158, and the cases there cited.) When this will was executed, the testator's daughter, *Christiana*, had four children; and, judging from the great length of time she lived after the date of the will, the testator undoubtedly supposed it probable that she might have several more. His intention was, and such, I think, is a fair construction of the words he has made use of, to give the property in question to his daughter, during her life, and to her descendants, after her death. But as a devise of the remainder to her children then born, would exclude any children she might afterwards have, he has, by the terms of his will, endeavored to guard against such an *event. On the part of the lessors of the plaintiff, it is insisted, that upon the testator's death, the whole estate vested at the same time; namely, an estate for life in his daughter, and a remainder in fee in her children then living; and, that in case *Christiana* should have borne any other child or children, after the date of the will, that the estate in remainder would open for the purpose of letting in "such child or children" for their share. On the part of the defendants it is admitted that, upon the death of the testator, *Christiana* took an estate for life; but it is contended, that the remainder was contingent, and did not vest until her death; and that then it went to her surviving child, under whom the defendants claim.

This latter construction of the will is extremely harsh, and opposed not only to the justice of the case, but, in my opinion, to the manifest intention of the devisor. The effect of it would be to exclude the grandchildren of *Christiana* altogether; and it ought, therefore, not to be allowed, unless the words of the devise admit of no other reasonable interpretation. I think the devise does admit of another construction, and one perfectly warranted by the words in which it is expressed.

The word *begotten* is here used as synonymous with the word *borne*; and, substituting the latter word, the will would read thus: "Such child or children as the said *Christiana* shall have lawfully borne at the time of her death." These latter words, "at the time of her death," evidently signify the same as, *in her life-time*. If the words, "at the time of her death," in the will, be taken in the sense here stated, and the words "shall have begotten," be considered as a verb in the future tense, the result will be the same; the devise will then read thus: "Such child or children as the said *Christiana* shall have lawfully begotten (or borne) in her life-time." The word "begotten," in this view of the case is, indeed, liable to some criticism, but the sense in which the testator has here used it, cannot be misapprehended. In adopting this interpretation, I cannot perceive that any violence is done to the words of

*the will itself; the whole of which, on the contrary, is thus rendered plain and intelligible, every presumption of a limitation in favor of the surviving heirs is repelled, and the clear intent of the testator effectuated.

The result of this construction is, that, upon the decease of the deviser, *Christiana* took an estate for life, and her four children, then living, took a vested remainder in fee; and, in case there had been any after-born child or children of *Christiana*, the remainder would have opened for their benefit, so that the property, in the language of the will, might be equally divided between them, share and share alike.

To give effect to the construction set up on the part of the defendants, we are compelled to add to the devise the word "surviving," and to read it thus: such *surviving* child or children as she may have, lawfully begotten, at the time of her death. This would make the remainder contingent, because of the uncertainty of the person who is to take: as it was unknown which, or whether any of the children of *Christiana* would survive her.—But it is an established rule, that the court never construes a limitation into an executory devise, when it may take effect as a remainder, nor a remainder to be *contingent*, when it can be taken to be *vested*. (6 *Cru. Dig.* 444. s. 1). 3 *Term Rep.* 488. *Ives v. Legg*, in note.)

This rule applies with peculiar force to the present case, and greatly increases my repugnance to the construction insisted upon by the defendants. Here, consistently with the terms of the will, it may be so construed as to give to the children of *Christiana*, born at the date of the will, a vested remainder.—And can there be any hesitation, in furtherance of the intent, to adopt such a construction, more especially, when the rights of the grandchildren are saved thereby, who would otherwise be entirely excluded?

In *Oates, ex dem. Hatterly, v. Jackson*, (2 *Str.* 1172. the devise was to the wife for life, and after her death, to her daughter *Isabella*, and her children on her body begotten, or to be begotten, and their heirs in fee. *Isabella*, *the daughter, at the time of making the will, had one daughter, and afterwards two sons and another daughter, all of whom she survived. It was held that *Isabella* took as joint tenant with all her children, as well that born at the time of making the will, as those born afterwards; and that it was no objection to the vesting of the estate in the children, because it commenced at different times. The words "to be begotten," used in this case, do not distinguish it from the one under consideration: because, "begotten" and "to be begotten," in the construction of wills and settlements, signify the same thing. This has been frequently so decided. (*Cook v. Cook*, 2 *Ver.* 545. 2 *P. Wms.* 426. *Hunt v. Ireland*.) In the case of *Doe, ex dem. Willis and others, v. Martin*, (4 *Term Rep.* 39.) the lands,

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by a marriage settlement, were conveyed to trustees, to the use of the wife for life ; remainder to the use of the husband for life, remainder to the use of the children of the marriage, or such of them, &c. as the husband and wife should appoint ; and, for the want of such appointment, to the use of every the child or children equally in fee. There were several children of the marriage, and no valid appointment having been made, it was held, that *all* the children took a vested, and not a contingent, remainder. But the case of *Doe v. Perryn* (3 Term Rep. 484.) is, perhaps, more exactly in point, though I think it a stronger case than the present. There the devise was to the niece of the testator, then a *feme covert* for life, remainder to trustees, to preserve contingent remainders, remainder to all and every the children of the niece, begotten, or to be begotten on her body, and their heirs, to be equally divided between them, with divers other remainders, for default of issue of the niece. The niece had no issue till after the death of the testator, and then she had three children. It was held, notwithstanding, that the estate *vested* on the birth of the first child of the niece, and that it afterwards opened for the benefit of the children subsequently born. The reasoning of *Buller, J.*, in this case is very forcible. He says, " But if this (the estate) were held not to vest till the death *of the parents, this inconvenience would follow, that it would not go to grandchildren ; for if a child were born, who died in the life-time of his parents, leaving issue, such grandchild could not take, which could not be supposed to be the intention of the devisor." In the case before us, the estate in remainder vested immediately upon the death of the testator, *Christiana* having four children then living ; and nothing has occurred since to divest it, for there was not even the birth of another child. (See also the cases of *Ives v. Legg*, and particularly, 1 Vez. jun. 174. *Cunningham v. Moody*. 1 Inst. 188. a. *Har. and Butt.* note 72. tit. *Tenants in Common*.) Some of these cases arose upon deeds, but the same rule prevails in the construction of wills. A devise of lands operates as an appointment to uses, in nature of a legal conveyance. (*Cowper*, 304, 305. *Hogan v. Jackson*.)

I am of opinion, therefore, that the intention of the testator, as fairly deducible from the will, was, after the death of his daughter *Christiana*, to give this property to all her children, born, or to be born after the date of the will ; that the children, upon the death of the testator, took a vested remainder, and, consequently, that the plaintiff is entitled to judgment, for an undivided fourth part of the premises in question.

KENT, Ch. J., THOMPSON, J., and YATES, J., were of the same opinion.

SPENCER, J. *Peter Praa* was seised in fee of the premises in question, which he devised as follows: "*Item*, I give and bequeath unto my daughter *Christiana Provoost*, the dwelling-house and ground she now lives on, to hold the said house and ground for and during the term of her life, and immediately after the death of the said *Christiana*, I give the above devised premises unto and among all and every such child and children as the said *Christiana Provoost* shall have lawfully begotten at the time of her death, in fee simple, equally to be divided between them, share and share *alike." Under this devise, *Christiana* continued in possession until her death in the year 1798, leaving *Jonathan Provoost* her only surviving child, and father of the defendants; and who on her death entered into possession, and continued therein until his death, prior to which he specifically devised the same, and the devisors entered.

Christiana Provoost had four children by her husband, *David Provoost*, at the time *Peter Praa* made his will, and at the time of his death; and one of them, *Catharine*, died before her mother, leaving the lessors of the plaintiff her heirs.

Is the remainder devised after the determination of the life estate, vested or contingent? If it be of the former kind, then it was capable of alienation, or descent; if of the latter, then the ancestor of the lessors, not being *in esse*, at the determination of the particular estate, took nothing by the devise. After the fullest consideration given to this question, my opinion is, that the remainder is contingent, and that none of the children of *Christiana* took any thing by the devise, unless living at her death. The devise is clearly contingent, as to the children who might be born of *Christiana* after the devise; but that circumstance, I admit, does not give a decisive character to the remainder, with respect to those who were *in esse* at the time; for it is well settled, that a vested remainder is subject to open on the birth of children, or the happening of events designated by the devisor.

There are no cases precisely parallel to the present; and I say, in the language of Lord Chief Justice *Wilmut*, that cases upon wills have no great weight, unless they are exactly to the very point, and similar, in every respect, to the case before the court. I am ready to admit, that the leaning of courts, if courts ought to lean, should be in favor of vested remainders. But if this doctrine be carried too far, we should not only distort and violate the words employed by devisors as signs of their ideas, but we should obliterate from our books all traces of distinction between vested and contingent remainders. The law benignly supposes, that *wills are made *in extremis*; it does not, therefore, exact the same technical nicety in wills as in deeds; but the rule is, to read the will, and, by its language and its evident intention, to collect its sense and mean-

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ing, and then to carry that intention into effect, if, consistently with the rules of law, it can be done. In interpreting this will, I conceive it my duty so to construe it as to avoid absurdities, and to pay particular attention to the state of things when it was made. The devisor had a daughter then married, who had four children; he contemplated the probability or possibility that this daughter might have other children, that her husband might die, and that she might have illegitimate children; he contemplated, also, the possibility, that of the four grandchildren then living, some of them might die before their mother. I say, all these events were contemplated by the testator, because the will evidently points to them all. The remainder is not devised to such children as *Christiana* should have, but to such child and children as she should have, clearly indicating, that it entered into his intention, that if by death there should be but one surviving child, then the remainder should go to that one. The remainder is given, not only to such child and children as *Christiana* should have, but to such child and children as she should have lawfully begotten; thus clearly manifesting an intention to exclude illegitimate children, and admitting the possibility that she might have such. And then, as I read the devise, the remainder is given to such legitimate child or children as *Christiana* shall have at the time of her death; or, in other words, to such legitimate children of *Christiana* as shall be living at the time of her death. In common parlance, "having children," when applied to any particular period, denotes children living. If it had been asked of *Christiana* just before her death, "How many children have you?" The answer would have been, "Three." Had the querist wished to have known more, and to have ascertained how many children she had borne, he would have put a different question, by asking, "How many children have you had?" To maintain, that the devisor meant to give the remainder to all the children that should be born of *Christiana*, without reference to their being living at the time of her death, and without making that the contingency, leads to great absurdities; it supposes, that the testator considered her capable of begetting children, a quality not attributable to females; and the testator must be presumed either to have introduced the words, "at the time of her death," without any meaning, or to have meant to exclude from inheriting, those children which she might beget after her death. If meaning is to be given to the words, "at the time of her death," it appears to me impossible to give them any other construction, than to consider it an epoch, by which the testator meant something; and by referring this back to such child and children as his daughter should have, evidently means, such as she should have living at the time of her death.

I can never agree to reject words employed in a will, when they can have a sense and operation; and much less

can I agree to construe words in such a manner as to produce absurdity, and make a testator speak nonsense. We have no right fancifully to substitute one mode of expression for another. We have no right to make a new will, but can only expound it upon known rules of construction, without violating the plain and obvious intent of the devisor. (2 *Eq. Ca. Abr.* 345. A. (4.) 9 *Mod.* 159.)

The case of *Doe v. Perryn* (3 *Term Rep.* 484.) is supposed to bear strongly on this case. But it is very distinguishable from it. There the devise was to *Dorothy Comberbach* for life, remainder to trustees to preserve contingent remainders, remainder to all and every the children of *Dorothy Comberbach*, begotten or to be begotten on her body by *J. Comberbach*, and their heirs for ever, to be equally divided between and among such children. The devisor then devised over the estate, if *Dorothy* died without issue. *Comberbach* and his wife had no issue at the time of the testator's death; they had three children, who died without issue, and in the life-time of their parents. The question was, whether any interest vested in the children of *Dorothy*. It was contended, that if the children of *Dorothy* took a fee, the limitation over *took effect, on the failure of issue of *Dorothy*, at the death of the survivor of *Dorothy* and her husband. The court were unanimously of opinion, that there was nothing in the will to limit the devise to such children as were living at the death of the survivor of *Dorothy* and *James*; and *Ashhurst, J.*, decides that case on this precise point, that there was nothing in the will to show, that the devise must necessarily be confined to children living at the decease of their parents.

In the present case, it is manifest to me there are such words, and that the devisor's intention is clear, that the remainder should enure to such legitimate children only, as *Christiana* should have, living at the time of her death. If this will be read without the words "lawfully begotten," there could be no doubt; these words can have no other operation than to denote the intention, that the child and children the testator meant to provide for should be legitimate.

The struggle with my brethren seems to be, to make the grandchildren of the testator also objects of the devise, and to give such a construction to the will, so as not to exclude the issue of the child of *Christiana*, who died in her life-time. Had the testator denoted an intention to provide for his grandchildren, I should have tried very hard to effectuate that intent; but I see no such intention in the will. In every view of the subject, I am confirmed in the opinion, that this remainder is contingent, and that, as the event on which the interest of the lessor's ancestor depended, did not happen, by her being alive on the death of *Christiana*, the defendant is entitled to judgment.

Judgment for the plaintiff.

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*HAMILTON and others against WILSON.

In an action for a breach of the covenant of *seisin* in a deed, brought by the *heirs* of the grantee against the grantor, it was held, that there being a failure of title, the covenant was broken as soon as it was made, and the grantee had an immediate and perfect right of action in his life-time, which went to his personal representatives, on his death, and did not descend to his heirs, who could not, therefore, maintain the action. (a)

(a) See 15 *Johns. Rep.* 468, note (a.)

THIS was an action of *covenant* brought by the plaintiffs, as *heirs* at law of *James Hamilton*, deceased, against the defendants. The declaration set forth a deed for certain lands in the military tract, made and executed by the defendant to *James Hamilton*, in his life-time, bearing date the 7th September, 1791. The deed was in the usual form, containing the covenant of *seisin*, &c. The plaintiffs alleged that the defendant, at the time of the delivery of the deed, was not seised, &c., and that he had not kept his covenant, &c. Plea, the general issue.

A motion was now made in arrest of judgment, because the covenant of *seisin* in which the breach is assigned was broken, if at all, as soon as it was made, and did not descend with the land to the plaintiffs, and that no action can be maintained by the heirs of the grantee, but the action must be brought by his personal representatives. (2 *Johns. Rep.* 1. *Greenby and Kellogg v. Willcocks.*)

The cause was submitted to the court without argument.

VAN NESS, J., delivered the opinion of the court. The breach assigned in this declaration is, that the defendant was not seised. The covenant, therefore, was broken the moment the deed was executed; and the ancestor had a perfect right of action for damages in his life-time. The question then is, whether, upon his death, this right of action descended to his heirs, or to his personal representatives.

The covenant here was not connected with the estate, because, as no estate passed by the deed to the ancestor, none descended to his heirs. Real covenants, such as run with the land only, go to the heir. The right of the ancestor was a mere right of action for a breach of the covenant in his life-time, which, upon his death, belonged exclusively to his personal representatives, and the damages recovered *in such cases are assets in their hands. This is so laid down by Justice *Doderidge*. (*Off. of Ex.* 65.) He says, "As to covenants touching inheritances, viz. the assurance of lands, or enjoying thereof, free of encumbrances, or the like, if the covenant be broken in the testator's life-time, I think clearly the action has accrued to the executor, for that his testator was to recover damages in the action of covenant for that breach, and being entitled to these damages as principal, and not any accessory thing in that action, the law hath cast that action upon the executor." Baron *Comyns* and *Buller* lay down the same rule for law. (*Com. Dig. tit Adminis. rator.*, B 13 *Bull. N*

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158.) The case of *Lucy v. Levington* (1 Vent. 175, 176. S. C. 2 Lev. 26.) is a leading authority on this question. That was an action by the executor upon a covenant for quiet enjoyment, made with the covenantee, his heirs and assigns, and the breach assigned was, that the plaintiff's testator was evicted in his life-time. *Ventris* says, "It was agreed by all the justices, that, though the covenant was made only to *I. S.*, his heirs and assigns, and though it was an estate of inheritance, yet, the breach being in the life-time of the testator, the executor had well brought the action for the damages." *Levinz*, however, gives the decision of the court, and the reasons upon which it was founded, more at large: "It was resolved by the court, that the eviction being to the testator, *he cannot have an heir or assignee* of this land; and so the damages belong to the executors, though not named in the covenants, for they represent the person of the testator." That the true reason is here given why the damages belonged to the executors, is evident from this consideration; the testator having been evicted in his life-time, on account of the failure of the title which he derived from the deed, there was no land at his death, to which the covenant could attach, and, therefore, the covenant could not descend to the heir. It is, perhaps, difficult to reconcile this principle with the precedent which is to be found in **Coke's Entries*, 111. That appears to have been a suit by *Barker*, the son and heir, &c., against *Wiseman*, upon the covenant of seisin, by the defendant to the plaintiff's ancestor, his heirs and assigns. The plaintiff had judgment, but it does not appear that the question whether the heir could maintain the suit was raised. The eviction is stated to have been of the heir, after the death of the ancestor, who entered in his life-time, and died seised, and the breach is alleged to have been to the heir, and that was the ground of action for the damages. Possibly there may have been some special circumstances to take that case out of the general rule, which do not appear upon the record: Some *dicta* may be found, which, at first view, would seem to support this action; but when critically examined, and on looking at the cases referred to in support of them, it will be found that the heir cannot, in any case, maintain an action on a covenant made with his ancestor, for the breach of which the ancestor had, in his life-time, a perfect right to prosecute.

The court are, therefore, of opinion, that the judgment ought to be arrested.

Judgment arrested.

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JACKSON
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*JACKSON, *ex dem.* FOLLIARD and WALLACE, *against*
WRIGHT.

N., a native of Ireland, emigrated to the United States in 1778, or 1779. In 1784, he purchased a lot of land in this state, and in 1798, died without issue, leaving a brother and three sisters living in Ireland. In 1804, an act of the legislature was passed, vesting the real estate of which N. died seised, in one of his sisters, who had married an alien, in like manner as if she had been a citizen, at the death of N.

In an action of ejectment, brought by F., who claimed a moiety of the lot, pursuant to an award of the Onondaga commissioners in his favor, it was held, that N.,

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having emigrated to this country after the declaration of independence, was to be considered as an alien, and that the land held by him was, by the 9th article of the treaty of 1794, between Great Britain and the United States, vested in him and his heirs, notwithstanding they were aliens; and that the act of the legislature of 1804, giving the whole of his real estate to L., one of his four heirs, in exclusion of the rest, being contrary to the treaty, was inoperative; but that the heirs, not having entered their dissent to the award of the commissioners within the two years limited by the act, were for ever barred and concluded by that award, except L., who was a *feme covert*, and within the saving of the act, there being no saving on account of absence from the state. (a)

THIS was an action of ejectment, for an undivided moiety of lot No. 12. in the town of *Hector*. The cause was tried at the *Seneca circuit*, before Mr. *Justice Spencer*, the 27th June, 1808; when a verdict was taken for the plaintiff, subject to the opinion of the court, on the following case.

The plaintiff produced in evidence, an award of two of the *Onondaga commissioners*, awarding an undivided moiety of the lot to *Wallace*, on the 12th April, 1800, which was duly entered in a book, filed in the clerk's office, and to which award no dissent was entered. The defendant was admitted to be in possession.

The defendant then gave in evidence a patent to *Folliard*, dated 8th July, 1790, and a deed from *Folliard* to *Abraham Nelson*, dated 5th August, 1784. *Nelson* left Ireland about the year 1778, or 1779, for the *United States*, and died about the year 1798, in *New-York*, without issue. He left a brother and three sisters, living in Ireland, who are *aliens*, and still alive. *Lydia*, one of the sisters, married *John Henry*, also an alien, before the death of *Abraham*. The defendant also gave in evidence, an act of the legislature of this state, passed 3d April, 1804, for the relief of *John Henry*, and *Lydia* his wife; and by which it was enacted, that all the real estate of which *Abraham Nelson* died seised, should be vested in the said *Lydia*, and her heirs, in like manner as if she had been a citizen at the death of her brother.

It was agreed, that if the court should be of opinion that the plaintiff was entitled to recover, the verdict was *to stand; otherwise, it was to be set aside, and a nonsuit entered.

Cady, for the plaintiff. Though *Lydia Henry* was married, yet, her husband being an alien, she must, as respects this case, be regarded as a *feme sole*. (2 Vin. 260. 273. 1 Comy. Dig. 96.) The husband gained no interest in right of his wife. Any saving, therefore, in the act relative to the titles in *Onondaga county*, (*Rev. Laws*, v. 2. p. 266.) of the rights of married women, does not apply. By that act, the award of

(a) *Jackson v. Lyon*, 9 Cow. Rep. 564. See *Jackson v. White*, 20 Johns. Rep. 313.

the *commissioners* was made final and conclusive, if notice of a dissent was not given in two years after pronouncing the award; and as no such dissent was entered, the same must be regarded as conclusive in *April*, 1804, to which time the act was extended. (*Laws of N. Y.* v. 3. p. 355. 504.) The *commissioners*, having been appointed by the people, to decide upon all titles relative to lands in the *county of Onondaga*, were authorized to determine on the rights of the people, as well as private persons; and having decided on the title, the people are concluded by their award.

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Henry, contra. The patentee transferred his right to *Nelson* in 1794, and *Nelson* died in 1798, before the award, so that he could not be affected by the award, nor any of his representatives, who are within the saving clause of the act. The plaintiff in ejectment must always recover on the strength of his own title; and if the defendant can show a subsisting title out of the lessor, it is enough to defeat his recovery. Now *Nelson* died without issue, and all his next collateral kindred are *aliens*, so that the property *escheated* to the people of this state, for want of persons capable in law to inherit. If so, then the title is in the people, and the plaintiff cannot recover. No office was necessary in this case, for wherever a right becomes vested in the sovereign, by operation of law, as by descent, remainder or reverter, or by *escheat*, no office is necessary. (6 *Comyns*, 63. *Prerog.* D. 70. 4 Co. 58.)

The power delegated to the *commissioners*, to decide on the titles to lands in the *county of Onondaga*, gave them no authority to decide on the rights of the people. The act was intended merely to settle the disputes between private persons. By the 10th section of the act, the duty of the *commissioners*, in regard to the rights of the people, is precisely marked out. They are required in all cases where it shall appear to them, that the people, or some other persons, other than any of the claimants, are entitled to the lands, to cause an entry to that purpose to be made in their books, and report the cases to the legislature.

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Again, the statute of limitations in *England* is held, not to extend to the *crown*, unless the king is expressly mentioned. Our statute is a copy from the *English* statute. By parity of reasoning, the limitation in the act relative to the lands in *Onondaga county* cannot be extended to the people unless by express words. If, on the death of *Nelson*, the right of property vested in the people by *escheat*, that right has never been divested. Should it be said, that *escheat* is one of the feudal qualities of land, and that the feudal tenures being abolished in this state, the doctrine does not apply here; it may be answered, that though the notion of *escheat* has a feudal origin in *England*, yet it is founded on a principle of universal law,

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that whatever does not belong to any individual, becomes the property of the sovereign ; for it is the policy of the law to give a determinate owner to every thing. (2 *Domat*. 356. B. 1. tit. 6. s. 3.)

Though an office should be thought necessary, and no office was found ; yet the people having an inchoate right to the land, a person entering would be an intruder, and a writ of intrusion, in behalf of the people, might issue. The title of the people may be made perfect by an inquisition, and the defendant has a right to protect himself under the title of the people. In 1804, the award of the *commissioners* could not be conclusive against the people.

By the act of the 3d April, 1804, *Lydia Henry* merely acquired the character of a citizen. A capacity to take real estate could injure no one ; and being then married, she took the estate, by descent, as a *feme covert*. A *feme covert* cannot alienate her rights by a matter *in pais*. She cannot act without her husband. If a *feme sole*, being a *citizen of this state, marries an *alien*, still the husband must join with her in any conveyance of her property. The court ought to be liberal in the construction of the act, so as to extend the *proviso*, since it is in furtherance of justice.

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Cady, in reply. Admitting that the right was in the people by *escheat*, still the people are estopped by the award of the *commissioners*. The *commissioners*, being appointed by the people, are judges of their own choice, and are authorized to decide on their rights.

The disability of a *feme covert* does not arise from the marriage simply, but from the rights acquired by the husband by the marriage. Now an *alien* has no rights in regard to lands, nor can he acquire any by marriage ; as it respects the estate of the wife, he is nobody.

Again, the defendant, not pretending any right, ought to be presumed as a party to the award of the *commissioners*. Being a wrong doer, he ought not to be allowed to set up the right of another, to protect himself.

VAN NESS, J., delivered the opinion of the court. The lessors of the plaintiff having, in the first instance, made out a sufficient title to a moiety of the premises in question, by the award of the *Onondaga* commissioners, we are to inquire, how far the defence relied upon has been supported. This defence is, that a subsisting title has been shown in *Lydia Henry*, which it is supposed she acquired by virtue of the act of the 3d April, 1804.

The legislature, probably, passed that act upon a suggestion that the lot in question had escheated to the state, on the ground that *Thomas Nelson*, who had purchased it from *Fol-*

liard, left none but alien heirs; and certainly, without being aware, that this was a case coming within the provision of the treaty of amity and commerce between the *United States* and *Great Britain*, concluded in 1794. By the 9th article of that treaty, "it is agreed, that *British* subjects, *who now hold lands in the territories of the *United States*, and *American* citizens, who now hold lands in the dominions of his majesty, shall continue to hold them according to the nature and tenure of their respective estates, and titles therein; and may grant, sell, or demise the same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns, so far as may respect the said lands, and the legal remedies incident thereto, shall be regarded as aliens."

Thomas Nelson, it appears, emigrated from *Ireland*, where, it is to be presumed, he was born, to the *United States*, in 1779; and resided here until his death, in 1798. Having emigrated after the declaration of our independence, he must be regarded as an alien, unless it is shown, by competent proof, that he became a citizen after that era, by naturalization. But that fact has not been shown. Naturalization is matter of record, and, perhaps, ought never to be presumed; but even if that were allowable, there is nothing in the present case to authorize such a presumption. If it were necessary to give an opinion as to the legal effect of the act of 1804, we might, for the purpose of upholding the title thereby granted to *Lydia Henry*, infer, from the language adopted therein, that *Nelson* had been permitted to purchase and hold lands in this state, by some of the many acts of our legislature, by which such permission has been given to aliens. It would, however, be going too far, to infer from this, that he had also been admitted to all the municipal rights enjoyed by citizens only.

Nelson, therefore, must be deemed to have been a *British* subject in 1794; and it appearing that he had purchased the lands in question previously to that period, the treaty settled his right thereto, and, upon his death, it descended to his heirs, notwithstanding they were aliens. The intention of the contracting parties to that treaty was, that the citizens and subjects of each should be quieted in the enjoyment of their estates, in the same manner as if they and their heirs had been native citizens.

*The case states, that *Nelson*, when he died, left three sisters and a brother living in *Ireland*, and that *Lydia Henry*, one of the sisters, then was, and still is, a *feme covert*. These four heirs, therefore, all inherited this property, and had a complete vested title thereto, on the death of *Nelson*, in 1798. The treaty is the paramount law; and the act of 1804, being contrary to it, inasmuch as it gives the estate to one of the four heirs in exclusion of the rest, is inoperative.

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The only remaining point to be examined is, whether any of these heirs are barred of their right to recover, by the limitation in the act for the appointment of the *Onondaga* commissioners. No dissent from the award has been entered, and more than two years had elapsed from the making the award to the commencement of this suit; so that all the heirs would be barred, were it not that the act saves the rights of married women. This saving extends to the right of *Lydia Henry* only, who was a *feme covert*, but the right of the others is gone, as absence from the state is not a saving in the act.

It results, therefore, that the defendant has shown a subsisting title in *Lydia Henry*, to an undivided fourth part, and the lessors of the plaintiff are entitled to recover their undivided eighth parts of the lot in question.

Judgment accordingly.

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*THOMPSON *against* EB. GREGORY.

Where A. granted 86 acres of land to B., reserving the streams of water, and the soil under them with the right of erecting mill dams, and all such part of the land as shall be overflowed by water, for the use of mills, for the grantor, and B. sold 40 acres of the premises to C., with the like exceptions, and C. erected a dam on his part of the land, by which the land of B. was overflowed, it was held, that, until A. exercised his right, and erected dams, the reservation was inoperative, and, if considered strictly as an exception, would be void for uncertainty; that an action on the case by B. against C., for erecting a dam so near the land of B. as to overflow it, was maintainable; and that a *parol* permission given to C. by A., was no defence; that the right reserved by the original grantor, being an incorporeal hereditament, could pass only by deed; and were it otherwise, the assignment of such an interest since the statute of frauds, must be in writing. (a)

THIS was an *action on the case*, for erecting a dam across a stream of water running through the land of the plaintiff, situate in the manor of *Rensselaer*, and so near the land of the plaintiff, that it was thereby overflowed. At the trial of the cause, the following facts appeared: The plaintiff was in possession of land, through which the stream ran, which was admitted to be an *ancient stream*, and in 1802, the defendant erected a *back-mill* and *dam*, below the possession of the plaintiff. The plaintiff's land, every season, was overflowed by the stream, at high water, before the dam was built; and the dam erected by the defendant prevented the water from running off the plaintiff's land as soon as formerly, and thereby destroyed its use as meadow. About nine acres of the plaintiff's land were thus overflowed.

The defendant gave in evidence a lease, dated 7th *January*, 1797, from the proprietor of the manor to one *Joshua Griggs*, which included the premises of the plaintiff, and also those of the defendant, where the *back-mill* and dam were erected. The

(a) See *Provest v. Calder*, 2 *Wend. Rep.* 517 *Jackson v. Stuart*, 20 *Johns. Rep.* 85.

lease contained about 86 acres, 40 acres of which were, on the 21st March, 1806, assigned by *Griggs* to one *Stephen Gregory*, and they included the land whereon the mill and dam were erected. The defendant held his premises by a *parol agreement* under *Stephen Gregory*. The lease to *Griggs* contained the following exception, "excepting, and reserving out of the grant, unto the grantor, his heirs and assigns, all mines, &c., and all streams and runs of water upon the premises, with the soil under the same, and the right and privilege of erecting upon any part of the premises, mills and dams, &c., for the use of the grantor, &c., and also such part of the said land, as may, by the said dams, be overflowed with water, &c., and also free ingress, &c., for the purposes of, &c., the grantor, his heirs and assigns, making a due abatement in *rent for the lands which he shall so use and occupy." The defendant contended that the lands of the plaintiff, thus overflowed, were included in the exception and did not pass by the grant, and that the plaintiff could not bring the action; but the objection was overruled: the defendant then offered to prove, by *Stephen Gregory*, that the defendant erected the mill and dam by permission of the original grantor, and the witness, on being examined as to his interest, said, that the fee of the land on which the mill and dam were erected was still in him, but that the defendant entered under a *parol* contract with him for the purchase of the land, and built the mill and dam thereon. The witness, being objected to as interested, was rejected; but the plaintiff offered to admit any permission in writing from the grantor. The witness then offered a release of his right to the premises in the possession of the defendant under the *parol* contract, and on which the mill and dam stood, and which release the defendant was ready to accept. The witness was still rejected as incompetent, and the jury found a verdict for the plaintiff for 31 dollars 8 cents damages.

A motion was made to set aside the verdict, and a case containing the above facts, was submitted to the court without argument.

Per Curiam. This case is submitted without argument, and the counsel for the defendant has stated several points, as reasons for setting aside the verdict, and awarding a new trial.

1. It is contended, that the plaintiff had no interest in the lands overflowed by the mill dam, as they were embraced by the exception or reservation contained in the original lease to *Griggs*. The lease excepts and reserves all streams, and the soil under them, with the right to erect mills, and mill dams, and it then excepts and reserves the land which may be overflowed in consequence of such dams. But until the grantor has exercised his right to erect mills and mill dams, it cannot be ascertained what *lands will be overflowed, and the reser-

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vation is, in the mean time, inoperative, and, considered strictly as an *exception* in the deed, it is void for uncertainty. It must be construed in relation to the subject matter, and it is like the right to erect mills, and to have ingress to them, the reservation only of a right to use the lands so conveyed, for such a specific purpose. The direct interest in the soil, in the mean time, passed by the deed; and the plaintiff can well maintain the present action, so far as respects his interest in the premises.

2. The next, and the principal point in the case, relates to the matter set up as a defence, and to the competency of the witness, who was offered to prove it. The defence was, that the mill and mill dam were erected by permission of *Stephen Van Rensselaer*, the original grantor, and *Stephen Gregory*, was offered as a witness to prove this permission. He was objected to, and rejected; but the plaintiff, at the same time, offered to admit in evidence any permission in writing from the grantor. It is not necessary to examine whether the witness was, or was not competent, because, assuming him to have been so, his testimony would have been of no avail, since the right in question could not pass by *parol*. The right reserved by the lease to the grantor, and his heirs and assigns, to erect mills, or mill dams, was an incorporeal hereditament. It was not the land itself, but a right annexed to it, and it could only pass by grant. The appropriate subject matter of grants is these incorporeal rights, of which livery cannot be had, and a grant is, in general, good only by deed. This was the rule of the common law; and were it otherwise, no such interest could be *assigned* or *granted*, without writing, according to the express provision of the statute of frauds. The court are of opinion, therefore, that the motion on the part of the defendant be denied.

Rule refused.

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*D. THORNE and W. THORNE against DEAS.

THIS was an action on the case, for a *nonfeasance*, in not causing insurance to be made on a certain vessel, called the *Sea Nymph*, on a voyage from *New-York* to *Camden*, in *North-Carolina*.

The plaintiffs were copartners in trade, and joint owners of one moiety of a brig called the *Sea Nymph*, and the defendant was sole owner of the other moiety of the same vessel. The brig sailed in ballast, the 1st *December*, 1804, on a voyage to *Camden*, in *North-Carolina*, with *William Thorne*, one of the plaintiffs, on board, and was to proceed from that place to *Europe* or the *West-Indies*. The plaintiffs and defendant were interested in the voyage, in proportion to their respective interests in the vessel. On the day the vessel sailed, a conversation took place between *William Thorne*, one of the plaintiffs, and the defendant, relative to the insurance of the vessel, in which *W. Thorne* requested the defendant that insurance might be made; to which the defendant replied, "that he (*Thorne*) might make himself perfectly easy on the subject, for that the same should be done." About ten days after the departure of the vessel on her voyage, the defendant said to *Daniel Thorne*, one of the plaintiffs, "Well, we have saved the insurance on the brig." *D. Thorne* asked, "How so? or whether the defendant had heard of her arrival?" To which the defendant answered, "No; but that, from the winds, he presumed that she had arrived, and that he had not yet effected any insurance." On this, *D. Thorne* expressed his surprise, and observed, "that he supposed that the insurance had been effected immediately, by the defendant, according to his promise, otherwise, he would have had it done himself; and that, if the defendant would not have the insurance immediately made, he would have it effected." The defendant replied, that "he (*D. Thorne*) might make himself easy, for he *would that day apply to the insurance offices, and have it done."

The vessel was wrecked on the 21st *December*, on the coast of *North-Carolina*. No insurance had been effected. No abandonment was made to the defendant by the plaintiffs.

The defendant moved for a nonsuit on the ground that the promise was without consideration and void; and that, if the promise was binding, the plaintiffs could not recover, without a previous abandonment to the defendant. These points were reserved by the judge.

A verdict was taken for the plaintiffs, for one half of the

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Where A. and B. were joint owners of a vessel, and A. voluntarily undertook to get the vessel insured, but neglected to do so, and the vessel was lost, it was held that no action would lie against A. for the non-performance of his promise, though B. sustained a damage by the *nonfeasance*, there being no consideration for the promise; but a factor or commercial agent, who is entitled to a commission, will be answerable for not executing an order to insure. (a)

(a) See *Bank of Utica v. Smodes*, 3 *Can. Rep.* 692. *Smodes v. Utica Bank*, 20 *Johns. Rep.* 372.

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cost of the vessel, with interest, subject to the opinion of the court on the points reserved.

J. Radcliff, for the plaintiffs.

1. That the plaintiffs and defendant were joint owners of the ship, cannot affect the plaintiffs' right of action. The parties are not partners; nor is it a joint tenancy. One part owner may be answerable to another on a special undertaking. (2 *Caines*, 293. 2 *Term Rep.* 483. 1 *East*, 20.)

2. Wherever a person undertakes to act as an agent for another, though not a broker or agent by profession, he will be entitled to a reasonable compensation for the service he may perform; and this will be a sufficient consideration to support the promise or undertaking. But in an action on the case, in the nature of a *tort*, for a *nonfeasance*, or a *misfeasance*, it is not requisite to show any consideration. The action is for the damages sustained in consequence of the *nonfeasance*, and not on the ground of the *assumpsit*. If the undertaking be *gratuitous*, and a special damage is caused by the failure of the party to perform the undertaking, an action will lie. The doctrine on this subject is well expressed by Sir *William Jones*, in his excellent essay on the law of bailments. (*Jones's Law of Bailments*, 2d edit. 52—60. Year-b. 11 *Hen.* IV. 33. 3 *Hen.* VI. 36. b. 37. a. *Stath. Abr. Ac. sur le cas*, pl. 20. and pl. 11. 19 *Hen.* VI. 49. *Bro. Abr. Ac. sur le cas*, 72. 1 *Roll. Abr.* 10.) After citing and commenting on several ancient cases on this subject, he adds: "It was not alleged, in either of the cases cited, that the defendant was to receive pay for the *feasance* of his work; but, since *both defendants were described as *actually in trade*, it was not, perhaps, intended, that they were to work for *nothing*. I cannot, however, persuade myself, that there would have been any difference, had the promises been purely *gratuitous*, and had a special injury been caused by the breach of them." And he then puts a case, by way of illustration. "Suppose," says he, "that *Robert's* cornfields are surrounded by a ditch or trench in which the water from a certain spring used to have a free course, but which has, of late, been obstructed by soil and rubbish; and that *Robert*, informing his neighbor *Henry* of his intention speedily to clear the ditch, *Henry* offers and undertakes immediately to remove the obstruction and repair the banks, without reward, he having business of the same kind to perform on his own grounds; if, in this case, *Henry* neglect to do the work undertaken, 'and the water, not having its natural course, overflow the fields of *Robert*, and spoil his corn,' may not *Robert* maintain his action on the case? Most assuredly," he answers: "And so in a thousand instances of proper bailments that might be supposed, where a just reliance on the promise of the defendant prevented the plaintiff from employ-

ing another person, and was consequently the cause of the loss which he sustained; for it is, as it ought to be, a general rule, that for every *damnum injuriâ datum*, an action of some sort, which it is the province of the pleader to advise, may be maintained; and although the *gratuitous* performance of an act be a benefit conferred, yet, according to the just maxim of PAULUS, *Adjuvari nos, non decipi, beneficio oportet*; (D. 13. 6. 17. 3.) but the *special* damage, not the assumption, is the cause of *this* action." The present case is perfectly analogous to the one put by Sir William Jones, and it is not easy to add to the clearness and force of his observations in support of the action. The doctrine, too, was laid down in *Coggs v. Barnard*, (2 Ld. Raym. 909.) that a person would be responsible for his negligence in performing a *gratuitous* promise.

In *Delaney v. Stoddard*, (1 Term Rep. 22.) which was an action for negligence, in not procuring insurance to be made, agreeably to the request of the plaintiff, the defendant was held liable, on his mere undertaking, without any consideration. It did not appear that the defendant was the general agent of the plaintiff, nor that he had been in the practice of procuring insurances to be made for the plaintiff. (1 Marshall, 205. 207.)

In *Smith v. Lascelles*, (2 Term Rep. 187.) it was laid down, that where a merchant abroad has effects in the hands of his correspondent in England, he has a right to expect that his correspondent will obey an order to insure; or if the merchant abroad has no effects in the hands of his correspondent, yet, if the course of dealing between them be such, as one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will be obeyed, unless notice to the contrary has been given; so the acceptance of a bill of lading, accompanied with an order to insure, will oblige the correspondent to execute the order.

In *Wallace v. Telfair*, (2 Term Rep. 188, in note.) where the merchant limited the broker to too small a sum, in consequence of which the insurance could not be obtained, the merchant was held answerable for the loss. These cases are much stronger than the one before the court, for there is no consideration mentioned, nor any express undertaking. They proceed on the general principle stated by Sir William Jones, and which is founded in convenience, as well as good faith, so essential in commercial transactions, and in the intercourse of society.

3. No abandonment is necessary in these cases, for negligence in the execution of an order to insure. Abandonment takes place only between the insured and insurer, on a policy of insurance. Even if the doctrine of abandonment was applicable, yet, as there was a physical total loss in this case, no abandonment was requisite; and the plaintiffs must recover

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according to the circumstances, and for the actual damages he has sustained.

**T. A. Emmet and Baldwin, contra.* 1. The parties were joint owners of the vessel, and jointly interested in the voyage. They are to be considered as partners in this transaction. One part owner cannot maintain an action at law against another part owner for advances beyond his share. (*Casy and Lawrence v. Brush*, 2 *Caines*, 293. *Watson on Partnership*, 54, 55. 409.) A mere verbal promise by one partner to another, to do a thing in relation to their joint concerns, cannot furnish a ground of action for the non-performance. If such an action could be maintained, then one partner might sue his copartner for every neglect, in the course of their copartnership transactions. Again, the plaintiffs and defendant being joint owners of the property, the defendant can never be liable, when he has taken the same care of the plaintiff's property as of his own. If he does the same for another as for himself, he is not answerable even for a case of misfeasance. (1 *H. Bl.* 158.) By neglecting to get insurance effected, the defendant is as much a loser as the plaintiffs. The promise was to insure the whole, and as the defendant was owner of half, he had a right to change his mind, and forbear to insure. Suppose the parties had given orders to a broker to have the insurance effected, and the defendant had countermanded the order, would not the broker have been justified in not executing the order?

2. But there was no *consideration* for the promise of the defendant. A contract or promise, without a consideration, is a *nudum pactum*, and void. (2 *Black. Com.* 445. 1 *Comyn on Contracts*, 8, 9, 10.) The question is, whether an action will lie for the non-performance of a *gratuitous* promise, though damage arise from the *nonfeasance*. It is true, that where a person voluntarily undertakes to do a thing for another, and does it *negligently* or unskillfully, he shall be answerable for the damages arising from his *misfeasance*. The inception of the performance is essential to support an action for a *misfeasance* or *tort*.

In *Wilkinson v. Coverdale*, (1 *Esp. Cas.* 75.) which was an action on a voluntary undertaking to get a policy done for another, and he did it so negligently that the policy was of no benefit to the person, this distinction between a *nonfeasance* and a **misfeasance* was taken by *Erskine*, and adopted by Lord *Kenyon*.

In *Elsee v. Gatward*, (5 *Term Rep.* 143.) which was an action against a carpenter, retained to repair a house, for the non-performance of his undertaking, in consequence of which the plaintiff's house was damaged, it was held, that no action would lie for the *nonfeasance*, without showing a consideration. Lord *Kenyon* says, "No consideration results from the defend-

ant's situation as a carpenter, nor from the undertaking; nor is he bound to perform all the work that is tendered to him; and therefore the amount of it is this, that the defendant has merely told a falsehood, and has not performed his promise; but for this non-performance of it, no action can be supported." This, he said, was warranted by the opinion of Lord Holt in the case of *Coggs v. Bernard*, (2 Ld. Ray. 909.) and he adds, "The justice of the case will not be altered by the form of the action; for if *assumpsit* will not lie in such a case, there is no technical reasoning that will support such an action, as for a tort." The distinction between a *nonfeasance* and a *misfeasance* is very ancient, and it is very clearly taken by Gould, J., and Powell, J., in the case of *Coggs v. Bernard*. (2 Ld. Ray. 909—919.)

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In the case of *Elsee v. Gatward*, the old cases from 11 Hen. IV. 33. to that time were examined, and the result of the investigation was, that, in the opinion of the Court of K. B., no action would lie for the non-performance of a *gratuitous* promise. On this decision of the precise point, now before the court, we might safely rely, but the authority of Sir William Jones has been confidently urged against the defendant; it therefore becomes necessary to examine the foundation of his opinion. Though justly respectable for his great genius and learning, that opinion, we trust, will, on examination, be found erroneous. His "Essay" was published before the decision in *Elsee v. Gatward*, and no notice of his doctrine is taken by the court, in that case. He must be considered as reasoning speculatively, and from the doctrine of the civil law, *against what he considered as the *dicta* of respectable judges in the English courts, in the early stages of their jurisprudence. Sir William Jones admits the distinction between a *nonfeasance* and a *misfeasance*, and that no action will lie for the *nonfeasance* of a gratuitous promise, unless *special damages* have been caused by the non-performance.

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To understand fully the observations of the judges in the several cases cited by Sir William Jones, from the year books, it is necessary to attend to the history of the action of *assumpsit*, which is said to have been first introduced into the law, in the reign of Henry IV. (3 Reeves's Hist. of Eng. Law, 244—246. 394—396. See also, 2 Comyn on Contracts, 549—554.) At that time, the only remedies for a breach of contract were by an action of *covenant* or *debt*, and it was a settled rule, that an action of *covenant* could be grounded only on a *specialty*; and debt would only lie for a *sum certain*, stipulated to be paid, or on a *specialty*; so that for the non-performance of a parol promise, the party was compelled to apply to a court of equity, which could not award any *damages* for the non-performance of an agreement.

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The first case is that in 2 *Hen. IV. 3 b.* where one *Wattón* brought an action against *Brinth*, for that having assumed to build a house for the plaintiff, by a certain day, he had not done it, to the damage of the plaintiff, &c. It was objected that this being on a covenant, and no writing shown, the action would not lie. The objection was supported by *Bryan, J.*, who, however, conceded, that if the plaintiff had alleged that the work had been begun, and that the defendant had afterwards neglected to finish it, the action might be maintained. A similar case arose in 11 *Hen. IV. 33.* and which was decided in the same manner. *Brooke* (*Tit. Act. sur case, 40.*) observes on these cases, that no consideration was alleged, and that, therefore, an action would not lie.

The next case was that of 3 *Hen. VI. 36 b. 37 a.* which is the one particularly commented on by Sir *William Jones. (a)*

(a) A translation of the case in 3 *Hen. VI. 36 b. 37 a.* may gratify curiosity, and serve to illustrate the argument in this cause. A writ of trespass was brought by one *W. B.* against *Watkins*, of *London*, a mill-wright. *Strange* counted on this case, to wit, that on such a day and year, in *London*, in such a ward, he undertook to make a mill for the plaintiff, and that the mill should be ready and raised, between that day and Christmas, in which time the mill was not raised, to the wrong and damage of the plaintiff, ten marks. *Rolf* (for the defendant) prayed judgment of the writ; for by the writ it is stated that the defendant should make a mill, and the plaintiff has not declared in certain how much he ought to have for doing it. Wherefore, &c.

Strange. Notwithstanding what has been said, we demand judgment, and pray our damages.

BABINGTON, Ch. J. If I bring a writ of deceit against one for this; that the defendant was my attorney, and that, by his negligence and default, I should lose my land, &c.—in this case it is fit that I should declare how he was retained by me, and took his wages, or, otherwise, the writ is abated, *sic hoc, &c.*

MARTIN, J. I have never seen it for law, that such a writ lies on such a matter shown as it is here stated. No *tort* has been done; it is stated only that he promised to do such a thing, which thing is not done; in which case a good writ of *covenant* would lie, if he had had a *specialty*; but if he had made a mill which had not been good, or had entirely spoiled or badly made it, then a good writ of trespass lies; as suppose that a smith make a covenant with me to shoe my horse, and, by his negligence, pricks my horse, on this matter shown, a good writ of trespass lies; for notwithstanding, on rehearsing the matter, an agreement is stated, I say, that in this case, that he has badly done the thing for which the agreement was made, and for this the agreement is changed into a *tort*, for which a good writ of trespass lies; but in the case at bar it is not so, for there no *tort* is stated in the writ, by the doing of the thing, only the non-observance of a thing, which sounds only in covenant. Wherefore, &c.

BABINGTON. It seems to me the contrary. Suppose that one makes an agreement with me to cover my house, within a certain time, within which time he does not cover it, so that, for want of the covering, the roof of the house is rotted by the rain; in this case, I say, that I shall have a good writ of trespass, on the matter shown against him that made the agreement with me, in which case I shall receive damages, as far as I am damaged by the non-observance. Wherefore, &c.

COKAIN, J., to the same point. And as to the first point moved, (that he should have declared that he made the agreement with him for a certain sum,) it seems to me that he has already said so, for it shall not be intended he was to make the mill for nothing, and so from his plea it is concluded, as

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*In remarking on the opinion of *Martin*, one of the judges, who objected to the action, that no *tort* was alleged, he seems to consider a special injury as equivalent to a *tort*; but a special injury does not constitute a *tort*, by which *Martin* clearly meant a *misfeasance*, thereby recurring to the *former and settled doctrine, as to a *misfeasance* or *negligence*, as distinguished from a *nonfeasance*; and the difficulty Sir *William Jones* finds in the opinion of *Martin*, J., arises wholly from his not sufficiently attending to the distinction *which has been stated, and to the objection made to the form of action, in a case of non-performance of a parol agreement. *Martin*, J., when he says, that the action will not lie for the *nonfeasance*, has no reference to the existence or non-existence of special damage, but merely to the distinction between a *nonfeasance* and a *misfeasance*. The case was shortly this. An action was brought against a mill-wright, for not making a mill, which he had undertaken to make by a certain day. *Rolf*, who was counsel for the defendant, objected to the writ, because it did

much as if he had expressly averred it in pleading. And as to the other point, on the matter shown, the writ lies sufficiently well. As suppose that one had made an agreement to repair certain ditches that are on my land, and he does not do it, so by his default, the water which ought to run in the ditch, overflows my land and destroys my corn, I shall have a good writ of trespass for this nonfeasance; so here.

Rolf. As to your first point, it seems to me, that it should be expressly mentioned in the writ, that he was bound to give the water free course; (*q'il duist en cas*;) and I say there is a great difference where one allows another to do a thing, and where he is a common laborer; for what a common laborer should have, is put in certainty by the statute, in which case, though nothing be mentioned in the agreement as to what he should have, the servant will have a good action of debt against him for his wages, according to the statute; but if I make an agreement with one to go with me, or to do a certain thing, and I do not put it in certainty what he is to have for doing it, in this case, I say, the agreement is void against both parties: for if he never performs the agreement, I shall never have an action against him; nor shall he, if he performs, have an action to demand any thing for his labor, unless it be reduced to certainty what he shall have; and so it seems to me, that if this action on this matter ought to be maintained, that the principal thing which causes the action should be openly set forth in the count, and that is the agreement, which is not good unless it be certainly expressed what he is to have. Wherefore, &c.

Strange. It seems to me the contrary, as to what Judge *Martin* has moved, that because no *tort* is supposed by the writ, that the writ ought not to lie. It seems to me that it shall; as suppose, that one makes a covenant with me to be my servant, and then I command him to go with my wagon, and he refuses to do it, I say that I shall have a writ of trespass against him, for his refusal, which is the *nonfeasance* of a thing, and so here.

MARTIN. I grant that, for this last is a departure from your service, for which a good action lies: and, as it truly seems to me, if this action shall be maintained on this matter, for each agreement broken in the world, there will be an action of trespass.

DARINGTON. All that we say is in vain, for they have not yet demurred; and, therefore, (addressing himself to *Strange* and *Rolf*;) plead and say what you wish, or demur, and then it can be sufficiently debated and disputed, at leisure. Wherefore, &c.

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not state a *consideration* for the promise, in which *Babington*, Ch. J., agreed with him. Then *Martin*, J., started another objection, that an action would not lie for the non-performance of a *parol* agreement, without referring to the circumstance of there being a consideration or not. *Babington* replied, differing in opinion from *Martin* on this point; and *Cokain*, J., thought neither objection tenable. *Rolf* replied, confining himself to the first objection made by himself; and *Strange*, on the other side, in his answer, took notice only of the new objection started by *Martin*; and there being this difference of opinion, the parties were ordered to plead or demur, that the questions raised might be afterwards more solemnly debated and considered.

The case of the 19 *Hen. VI.* 49. referred to by Sir *William Jones*, was an action against a smith, on his undertaking to cure a horse of a certain malady, alleging, that he so negligently and improvidently administered medicine, &c., that the horse, &c. The plea traversed the undertaking, and there was considerable dispute, whether the traverse ought to lie on the undertaking or to the negligence. In the course of the argument, the case of a carpenter, for not doing the work, &c. and several others, were cited, in which it was insisted that the traverse must be on the undertaking; now, the undertaking to be traversed must be intended to be lawful and obligatory, not gratuitous, or a *nudum pactum*.

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In the case of 21 *Hen. VII.* 41. which Sir *William Jones* cites from *Brooke*, as "made complete from *the year book," *Fineux*, J., said, "If one makes an agreement to build a house for me by a certain day, and he does nothing of it, I shall have an action on the case, on this *nonfeasance*, as well as if he had mis-done it; for I am damaged by this:" but the case *Fineux* immediately puts, by way of illustration, clearly shows that he supposed a consideration for such a promise, and that a consideration was requisite, and he had in his mind the opinion then prevailing, that on such a *parol* covenant or agreement, the party must resort to a court of equity. He says, "And so if one makes a bargain with me, that I shall have his land to me and my heirs, for twenty pounds, and that he will make the estate to me, if I pay him the twenty pounds; if he will not make the estate to me according to the covenant, I shall have my action on the case, and will need not to sue out a *sub-pœna*."

The case of *Powtuary v. Walton*, cited from 1 *Roll. Ab.* 10. (See also 1 *Vin.* 277. 1 *Danv.* 32. pl. 5.) was that of a farrier, who undertook to cure a horse, and did it so negligently, that the horse died; and it was said, "that an action would lie, without alleging a consideration; for the *negligence* is the cause of the action, not the *assumpsit*." This is within the distinction before laid down, between a *nonfeasance* and a *mis*
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feasance. The same case is again to be found, in 1 *Roll. Ab.* 91, 92. and in 1 *Vin. Ab.* 563. *Actions, (case disceit)* pl. 16.

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The case mentioned by Sir *William Jones*, in a note from *Statham's Abridgment*, as decided by Justice *Paston*, is that of a blacksmith, and it must be intended of a binding contract, not a mere gratuitous undertaking; for it is said, "I shall have my action on the case, for through his default, peradventure my horse may die." In all the cases to be found, where an action was held maintainable, there is a consideration for the promise, and the special damage is assigned, as a reason for maintaining an action of trespass on the case, instead of obliging the party to go into a court of equity.

Again, special damage alone, be it ever so great, will not give a right of action. Neither will an action lie for a *mere injury without damage. To maintain an action, there must be *damnum et injuria* combined. To constitute an injury, there must be a binding undertaking, or a duty to perform the act, which the party neglects, or violates. The non-performance of a *gratuitous* promise produces no injury, as the party making such promise, has a right to refuse to perform it; nor can the person to whom it is made enforce its performance. There is no legal obligation violated by the non-performance of such a promise. There can be no legal obligation, where there is no consideration; and if the contract is obligatory, neither party can discharge himself from his liability. Though a person may be deceived by a gratuitous promise, it is not an injury for which an action will lie. It is, at most, a naked lie, or a breach of honor.

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3. If the defendant is liable, he must stand in the place of an insurer, and is entitled to every advantage possessed by an insurer. An abandonment is as necessary, as if a policy had been actually effected. There was not a total loss, for it does not appear, but that the vessel may have been got off, after she stranded, and many things may have been saved.

Radcliff, in reply, observed, that the plaintiffs and defendant had separate and distinct interests in the vessel; and that though, in regard to third persons, they may be considered in the light of partners, yet, as among themselves, they were merely tenants in common.

Whatever may have been the doctrine of the ancient common law, which, however, is very obscure in relation to the cases cited, it is certain that in modern times, in regard to commercial transactions, in which the purest good faith is required, and which it is the policy of the law, in a commercial age, to enforce, a different rule prevails. This is manifest from the cases already cited, and which are stated by *Marshall*, in his treatise on insurance. The principle on which these

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decisions have proceeded, is the mutual confidence between the parties, and the just reliance *placed by the merchant on his agent or correspondent, in which the courts, anxious to enforce the rules of morality and good faith, will not permit him to be deceived. In several of the cases, the undertaking has been merely implied from the relative situation of the parties, and their course of dealing with each other. Here was an express undertaking to get the insurance effected, by which the plaintiffs were lulled into security, and were prevented from doing it themselves, or employing another person. It is true that a person may retract such a gratuitous promise; but he must take care to do it in season, and before any damage results to the other party, by his non-performance or neglect.

KENT, Ch. J., delivered the opinion of the court. The chief objection raised to the right of recovery in this case, is the want of a consideration for the promise. The offer, on the part of the defendant, to cause insurance to be effected, was perfectly voluntary. Will, then, an action lie, when one party intrusts the performance of a business to another, who undertakes to do it gratuitously, and wholly omits to do it? If the party who makes this engagement, enters upon the execution of the business, and does it amiss, through the want of due care, by which damage ensues to the other party, an action will lie for this *misfeasance*. But the defendant never entered upon the execution of his undertaking, and the action is brought for the *nonfeasance*.

Sir William Jones, in his "*Essay on the Law of Bailments*," considers this species of undertaking to be as extensively binding in the *English* law, as the contract of *mandatum*, in the *Roman* law; and that an action will lie for damage occasioned by the non-performance of a promise to become a *mandatary*, though the promise be purely gratuitous. This treatise stands high with the profession, as a learned and classical performance, and I regret, that, on this point, I find so much reason to question its accuracy. I have carefully examined all the authorities to which he refers. He has not produced a single adjudged *case; but only some *dicta* (and those equivocal) from the *Year Books*, in support of his opinion; and was it not for the weight which the authority of so respectable a name imposes, I should have supposed the question too well settled to admit of an argument. (a)

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A short review of the leading cases will show, that, by the

(a) See the note to *Edwards v. Davis*, 16 Johns. Rep. 223.

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common law, a *mandatary*, or one who undertakes to do an act for another, without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss. In other words, he is responsible for a *misfeasance*, but not for a *nonfeasance*, even though special damages are averred. Those who are conversant with the doctrine of *mandatum* in the civil law, and have perceived the equity which supports it, and the good faith which it enforces, may, perhaps, feel a portion of regret, that Sir *William Jones* was not successful in his attempt to ingraft this doctrine, in all its extent, into the *English* law. I have no doubt of the perfect justice of the *Roman* rule, on the ground, that good faith ought to be observed, because the employer, placing reliance upon that good faith in the mandatary, was thereby prevented from doing the act himself, or employing another to do it. This is the reason which is given in the *Institutes* for the rule: *Mandatum non suscipere cuilibet liberum est; susceptum autem consummandum est, aut quam primum renunciandum, ut per semetipsum aut per alium, eandem rem mandator exequatur.* (Inst. lib. 3. 27. 11.) But there are many rights of moral obligation which civil laws do not enforce, and are, therefore, left to the conscience of the individual, as rights of imperfect obligation; and the promise before us seems to have been so left by the common law, which we cannot alter, and which we are bound to pronounce.

The earliest case on this subject, is that of *Watson v. Brinth*, (*Year Book*, 2 Hen. IV. 3 b.) in which it appears that the defendant promised to repair certain houses of the plaintiff, and had neglected to do it, to his damage. The plaintiff was nonsuited, because he had shown no covenant; *and *Brincheley* said, that if the plaintiff had counted that the thing *had been commenced, and afterwards, by negligence, nothing done*, it had been otherwise. Here the court, at once, took the distinction between *nonfeasance* and *misfeasance*. No consideration was stated, and the court required a covenant to bind the party.

In the next case, (11 Hen. IV. 33 a.) an action was brought against a carpenter, stating that he had undertaken to build a house for the plaintiff, within a certain time, and had not done it. The plaintiff was also nonsuited, because the undertaking was not binding without a specialty; but, says the case, *if he had undertaken to build the house, and had done it illy or negligently*, an action would have lain, without deed. *Brooke*, (*Action sur le Case*, pl. 40.) in citing the above case, says, that "it seems to be good law to this day; wherefore the action upon the case which shall be brought upon the assum-

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tion, must state that for such a sum of money to him paid, &c., and that in the above case, it is assumed, that there was no sum of money, therefore it was a *nudum pactum*."

The case of 3 *Hen. VI. 36 b.* is one referred to, in the *Essay on Bailments*, as containing the opinion of some of the judges, that such an action as the present could be maintained. It was an action against *Watkins*, a mill-wright, for not building a mill according to promise. There was no decision upon the question, and in the long conversation between the counsel and the court, there was some difference of opinion on the point. The counsel for the defendant contended, that a consideration ought to have been stated; and of the three judges who expressed any opinion, one concurred with the counsel for the defendant, and another (*Babington*, Ch. J.) was in favor of the action, but he said nothing expressly about the point of consideration, and the third (*Cokain*, J.) said, it appeared to him that the plaintiff had so declared, for it shall not be intended that the defendant would build the mill for nothing. So far is this case from giving countenance to the present action, that *Brooke* (*Action sur le Case*, pl. 7. and **Contract*, pl. 6.) considered it as containing the opinion of the court, that the plaintiffs ought to have set forth what the miller was to have for his labor, for otherwise, it was a *nude pact*; and in *Coggs v. Bernard*, Mr. Justice Gould gave the same exposition of the case.

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The general question whether *assumpsit* would lie for a *non-feasance*, agitated the courts in a variety of cases, afterwards, down to the time of *Hen. VII.* (14 *Hen. VI. 18 b.* pl. 58. 19 *Hen. VI. 49 a.* pl. 5. 20 *Hen. VI. 34 a.* pl. 4. 2 *Hen. VII. 11.* pl. 9. 21 *Hen. VII. 41 a.* pl. 66.) There was no dispute or doubt, but that an action upon the case lay for a *misfeasance* in the breach of a trust undertaken voluntarily. The point in controversy was, whether an action upon the case lay for a *nonfeasance*, or non-performance of an agreement, and whether there was any remedy where the party had not secured himself by a covenant or specialty. But none of these cases, nor, as far as I can discover, do any of the *dicta* of the judges in them, go so far as to say, that an *assumpsit* would lie for the non-performance of a promise, without stating a consideration for the promise. And when, at last, an action upon the case for the non-performance of an undertaking came to be established, the necessity of showing a consideration was explicitly avowed.

Sir *William Jones* says, that "a case in *Brooke*, made complete from the *Year Book* to which he refers, seems directly in point." The case referred to is 21 *Hen. VII. 41.* and it is given as a loose note of the reporter. The chief justice is there made to say, that if one agree with me to build a house by such a day, and he does not build it, I have an action on

the case for this *nonfeasance*, equally as if he had done it amiss. Nothing is here said about a consideration; but in the next instance which the judge gives of a *nonfeasance* for which an action on the case lies, he states a consideration paid. This case, however, is better reported in *Keilway*, 78. pl. 5., and this last report must have been overlooked by the author of the "Essay." *Frowicke*, Ch. *J., there says, "that if I covenant with a carpenter to build a house, and pay him 20*l.* to build the house by a certain day, and he does not do it, I have a good action upon the case, *by reason of the payment of my money; and without payment of the money in this case*, no remedy. And yet, if he make the house in a bad manner, an action upon the case lies; and so for the *nonfeasance*, *if the money be paid*, action upon the case lies."

There is, then, no just reason to infer, from the ancient authorities, that such a promise as the one before us is good, without showing a consideration. The whole current of the decisions runs the other way, and, from the time of *Henry VII.* to this time, the same law has been uniformly maintained.

The doctrine on this subject, in the *Essay on Bailments*, is true, in reference to the *civil law*, but is totally unfounded in reference to the *English law*; and to those who have attentively examined the head of *Mandates*, in that *Essay*, I hazard nothing in asserting, that that part of the treatise appears to be hastily and loosely written. It does not discriminate well between the cases; it is not very profound in research, and is destitute of true legal precision.

But the counsel for the plaintiffs contended, that if the general rule of the common law was against the action, this was a commercial question, arising on a subject of insurance, as to which, a different rule had been adopted. The case of *Wilkinson v. Coverdale*, (1 *Esp. Rep.* 75.) was upon a promise to cause a house to be insured, and Lord *Kenyon* held, that the defendant was answerable only upon the ground that he had proceeded to execute the trust, and had done it negligently. The distinction, therefore, if any exists, must be confined to cases of marine insurance.

In *Smith v. Lascelles*, (2 *Term Rep.* 188.) Mr. Justice *Buller* said it was settled law, that there were three cases in which a merchant, in *England*, was bound to insure for his correspondent abroad.

*1. Where the merchant abroad has effects in the hands of his correspondent in *England*, and he orders him to insure.

2. Where he has no effects, but, from the course of dealing between them, the one has been used to send orders for insurance, and the other to obey them.

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3. Where the merchant abroad sends bills of lading to his correspondent in *England*, and engrafts on them an order to insure, as the implied condition of acceptance, and the other accepts. .

The case itself, which gave rise to these observations, and the two cases referred to in the note to the report, were all instances of *misfeasance*, in proceeding to execute the trust, and in not executing it well. But I shall not question the application of this rule, as stated by *Buller*, to cases of *non-feasance*, for so it seems to have been applied in *Webster v. De Tastet*. (7 Term Rep. 157.) They have, however, no application to the present case. The defendant here was not a factor or agent to the plaintiffs, within the purview of the law-merchant. There is no color for such a suggestion. A factor, or commercial agent, is employed by merchants to transact business abroad, and for which he is entitled to a commission or allowance. (*Malyne*, 81. *Beaves*, 44.) In every instance given, of the responsibility of an agent for not insuring, the agent answered to the definition given of a factor, who transacted business for his principal, who was absent, or resided abroad; and there were special circumstances in each of these cases, from which the agent was to be charged; but none of those circumstances exist in this case. If the defendant had been a broker, whose business it was to procure insurances for others, upon a regular commission, the case might, possibly, have been different. I mean not to say, that a factor or commercial agent cannot exist, if he and his principal reside together at the same time, in the same place; but there is nothing *here from which to infer that the defendant was a factor, unless it be the business he assumed to perform, viz. to procure the insurance of a vessel, and that fact alone will not make him a factor. Every person who undertakes to do any specific act, relating to any subject of a commercial nature, would equally become, *quoad hoc*, a factor; a proposition too extravagant to be maintained. It is very clear, from this case, that the defendant undertook to have the insurance effected, as a voluntary and gratuitous act, without the least idea of entitling himself to a commission for doing it. He had an equal interest in the vessel with the plaintiffs, and what he undertook to do was as much for his own benefit as theirs. It might as well be said, that whenever one partner promises his copartner to do any particular act for the common

benefit, he becomes, in that instance, a factor to his copartner, and entitled to a commission. The plaintiffs have, then, failed in their attempt to bring this case within the range of the decisions, or within any principle which gives an action against a commercial agent, who neglects to insure for his correspondent. Upon the whole view of the case, therefore, we are of opinion, that the defendant is entitled to judgment.

Judgment for the defendant.

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THIS was an action of *assumpsit*. Plea, the general issue. A verdict was taken for the plaintiff, at the *sittings* in New-York, subject to the opinion of the court on a case containing the following facts:

The plaintiff, being owner of a ship called the *Nancy*, lying at *Wilmington, N. C.*, taking on board a cargo for *Liverpool*, in *England*, where the defendants carried on trade, on the 17th May, 1803, wrote a letter to the defendants, informing them that the ship would be despatched to *Liverpool* to their address, that he had drawn bills on them for 1,350*l.* sterling, and requesting them to have insurance made on the ship, in *London*, or such other place in *Great Britain* as might be convenient, valuing her at 1,200*l.* sterling, his part of the cargo at 304*l.*, and the freight at 1,280*l.*, that he should send to them a power of attorney to sell the ship, as he meant, at all events, to make them safe in the acceptance and payment of the bills, and believing the ship and cargo would be in their possession before the bills were presented for acceptance.

This letter was received by the defendants, on the 23d July,

Where A., of *Wilmington, N. C.*, wrote to B., in *Liverpool*, enclosing an invoice and bill of lading of a cargo consigned to him, and informing him that he had drawn bills to a certain amount, and B., in his answer, agreed to receive the consignment, and accept the bills, but, afterwards, refused one of the bills, which was returned protested, it was held that B. was answerable to A. for all the damages and costs, paid by him on the protested bill.

Where A. consigned a vessel and cargo to B., at *Liverpool*, and advised him that he should make him secure for the acceptance of his bills, and sent him a power of attorney to sell the vessel, with directions to sell her in *England*, but if that could not be done, to procure a freight, or load her with as much salt as the funds of A. were equal to, and send her to *New-York*; and B. loaded the vessel with coals, and having, under the power from A., executed a bill of sale of the vessel to C., of *New-York*, and sent the vessel and cargo to C., with directions to reconvey and deliver them to A., on his paying the balance due to B. for advances, otherwise, to sell them and place the proceeds to the credit of B., paying over the balance that might remain to A., who was also informed by B. of the transfer and consignment to C. A. refused to accept the vessel and cargo from C., contending that B. had made the vessel his own. It was held that B., not having followed the orders of A. in relation to the cargo, it belonged to B., and that A. was not bound to accept it, nor liable for any charges attending it; that the vessel being intended as security to B., he had a *lien* upon her for his advances, and that the assignment to C. being merely for the purpose of preserving that *lien*, and not an absolute sale, A. was bound to accept the ship, and pay the premium of insurance, and all the advances made by B. for repairs, &c. Though a factor cannot pledge the goods of his principal as his own, yet he may deliver them to a third person as security, with notice of his *lien*, and as his agent to keep the possession for him, in order to preserve that *lien*.

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1803; and before any other letter or communication was received from the plaintiff, they, on the same day, wrote a letter to the plaintiff, acknowledging the receipt of his letter of the 17th *May*, enclosing an invoice and bill of lading, for timber and staves, on board the *Nancy*, which had not then arrived; but that they had effected the insurance *on the ship, cargo, and freight, in all 2,784*l.*, at three guineas per cent., and that they should accept the plaintiff's bill when offered.

On the 31st *May*, 1803, the plaintiff wrote a second letter to the defendants, by the ship, enclosing a power of attorney to sell the ship, observing, that if the prices quoted should continue, he had little doubt that the ship would make a handsome freight, but that it rested with the defendants to make the most of matters for his interest; that if they should fail in making sale of the ship to his advantage, he wished her to be ballasted with salt, and that they would endeavor to get all the freight they could for *New-York*, and despatch her there with the utmost speed, making insurance as ordered, &c., and give him notice, &c., mentioning a balance of 70 or 80 pounds due to him in *London*, which he should direct to be paid to the defendants; that if the ship was sold to return to *America*, the crew were bound by the articles to return in her, &c., and that he enclosed an act of Congress in that case.

The *Nancy* arrived at *Liverpool*, the 24th *July*, 1803; and, on the 25th *July*, the defendants wrote to the plaintiff, acknowledging the receipt of his last letter, and the arrival of the ship, and declaring that they should attend to his directions respecting the ship and cargo, but were apprehensive that the ship could not be sold; that the bills had not appeared, but would be honored when presented, &c.

On the 10th of *June*, 1803, the plaintiff wrote to the defendants, that he had drawn three bills on them, amounting to 1,350*l.* sterling, agreeably to his letter of the 17th *May*.

On the 9th *July*, 1803, the plaintiff again wrote to the defendants, that, if the ship could not be sold, agreeably to his orders, they must ballast her with salt, and set her up for freight for *New-York*; and that if a freight could be procured, not to ship salt; otherwise, to ship as much salt as his funds would permit, or the vessel could carry with ease; and that, instead of insuring the ship and his property, and the freight as formerly directed, the defendants should advise *R. Wilkins*, of *New-York*, of the amount *shipped, and the freight, to regulate him in making the insurance at *New-York*, which charge as to the insurance, the plaintiff said, proceeded from a fear that his funds would not be sufficient to ballast the ship with salt, and pay the premium of insurance there, in case no back freight offered.

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The defendants received and disposed of the cargo at *Liverpool*, and credited the plaintiff with the proceeds, amounting to 1,092*l.* 15*s.* 10*d.* sterling, and with the freight to *Liverpool*, being 251*l.* 10*s.* 6*d.* The disbursements made by them for the vessel amounted to 537*l.* 11*s.* 4*d.*, and they accepted two of the plaintiff's bills, amounting to 900*l.*; but the third bill for 450*l.* being presented, the defendants answered, that it could not then be accepted, but would probably be paid when due. It was protested for non-acceptance, on the 18th *August*, and for non-payment on the 19th *November*, 1803.

The ship could not be sold to advantage in *Liverpool*, and no freight could be obtained for *New-York*. The defendants shipped on board salt and coal, to the amount of 295*l.* 10*s.* 8*d.* sterling, and to secure themselves for their advances and acceptances, consigned the same to *Lenox & Maitland* in *New-York*, on account of the plaintiff, and as attorneys for the plaintiff, executed to *Lenox & Maitland*, a bill of sale of the ship, for the consideration of 1000*l.* sterling, which was not actually paid, the bill of sale and consignment being intended for their security.

On the 12th *September*, 1803, the defendants wrote to the plaintiff, advising him of what had been done; that their disbursements, the salt, and coal, and insurance, &c. to *New-York*, amounted to 888*l.* 1*s.* 5*d.* that, after paying the drafts of the plaintiff to 1,350*l.* there would be due to the defendants a balance of 1,020*l.* 18*s.* 2*d.* to secure which they had sold the ship to *Lenox & Maitland*, and consigned the salt and coal to them for sale, and they hoped that after these were sold, the plaintiff would have little to pay besides, *and take back his ship; that they should have a small account further against him for advances, &c.

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The defendants, on the 13th *September*, 1803, wrote to *Lenox & Maitland*, enclosing the invoice and bill of lading for the salt and coals, and informing them that the cargo was shipped on account of the plaintiff; but as the funds arising from the sale of the outward cargo were not sufficient to pay his drafts, the disbursements on the ship, and for that cargo, they had, under a power of attorney, assigned the ship to them, and, if the plaintiff reimbursed them, they were to convey the ship to him; that the salt and coals were to be sold, and the proceeds credited to the defendants; and that if the plaintiff did not pay or secure the balance, then *Lenox & Maitland* were to sell the ship, and place the proceeds to the credit of the defendants, paying over the balance to the plaintiff.

The ship and cargo, on the return voyage, were insured at *Liverpool*, and the defendants paid the premium. The ship, on

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her voyage, was damaged by the perils of the sea, and was obliged to return to *Liverpool* for repairs. The further expenses of repairs amounted to 582*l.* 1*l.* 1*d.* sterling, of which the defendants, in a letter of the 5th *November*, 1803, to the plaintiff, advise him, and add, that they hope to recover part of these expenses from the insurers, though they seemed disposed to resist the payment, on the ground that the ship was not seaworthy; and that the advances on account of the last disaster prevented them from paying the plaintiff's draft for 450*l.* due on the 2d of *November*, as they intended to have done when they wrote in *September*.

On the 6th *November*, 1803, the vessel sailed again from *Liverpool*, and arrived at *New-York*, on the 27th *December*, 1803. On the 29th *December*, *Lenox & Maitland* wrote to the plaintiff, informing him of the fact, &c., and hoping that the demand of the defendants would be liquidated, so that they might restore to him the vessel.

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By consent of the plaintiff, the vessel and cargo were sold, without prejudice, for 3863 dollars and 93 cents. The *plaintiff insisted, that the defendants had made the vessel their own, and refused to take her and the avails of the cargo, and to pay the demand of the defendants. The plaintiff paid the bill of 450*l.* which had been protested, with damages and interest. By the transfer of the ship to *Lenox & Maitland*, the register of the ship was not lost, nor any forfeiture incurred.

It was agreed, that if the court should be of opinion, that the plaintiff was entitled to recover, that they should ascertain the damages, or fix the principles on which they were to be computed, and appoint a suitable person to make the computation; and if, on the principles established, a balance appeared to be due to the defendants, a judgment was to be entered accordingly.

Sampson, for the plaintiff. 1. By accepting the consignment, the defendants were bound to accept and pay the bills drawn on them by the plaintiff; they are, therefore, responsible for the damages and costs on the bill which was protested. (*East*, 34. 3 *Burr.* 1672.) 2. The defendants, as agents and factors, were bound to pursue the orders of the plaintiff. Factors are obliged strictly to observe the orders of their principal. (*Malynes's Lex. Merc.* p. 81. s. 16. p. 86. s. 64. 2 *Term Rep.* 187.) The least deviation renders them liable for the consequences. Where the authority of the agent is limited, and he exceeds that authority, the principal is not obliged to accept of the contract he has made, but may throw the goods on the hands of the factor. (*Le Guen v. Gouverneur & Kemble*, 1 *Johns. Cases*, 438, and in note. 1 *Ves.* 509.) Here the defendants were directed to sell the ship in *England*; but if that was impractic-

cable, they were to ballast her with salt, procure a freight, and send her back to *New-York*; or in case no freight offered, to load her with as much salt as the funds of the plaintiff were equal to purchase. They had no authority to create any new debt, or to make the plaintiff responsible beyond the funds in their hands. By his letter of the 9th *July*, 1803, the plaintiff expressly directed the defendants not to insure, but to give advice to Mr. *Wilkins* of *New-York*, to insure her, in case the vessel was sent back; and this direction was given, for fear his *funds in *Liverpool* would not be sufficient to pay the premium there. 3. The defendants, by loading the vessel, by causing her to be insured at *Liverpool*, and in giving no advice to Mr. *Wilkins*, entirely deviated from their orders. They have, by their unauthorized conduct, made the vessel their own, and are answerable to the plaintiff for her. The plaintiff had a right to abandon the vessel to the defendants, and hold them responsible for her full value, or at their own valuation. The defendants, having made themselves liable as insurers, (2 *Vesey*, 239.) have no right to charge the plaintiff for the premiums they have paid. The defendants had authority merely to sell the ship at *Liverpool*; if they did not think best to exercise that authority there, they had no power to dispose of her in any other way. A factor can sell only according to his authority; he cannot, under his general authority, sell on credit, nor to persons beyond sea. (12 *Mod.* 514, 515. *Yelv.* 202. *Bulst.* 103.) Nor had the defendants any right to pledge the vessel, or assign her, by way of security, to *Lenox & Maitland*. It is beyond the scope of a factor's authority, to pledge the goods of his principal. (6 *East*, 41. *Newson & Thornton*.)

4. The defendants, by their departure from the orders of the plaintiff, and their neglect and misconduct as factors, are responsible for all the damages which have resulted from the measures they have pursued.

T. L. Ogden and Colden, contra. The principles of law which have been stated, relative to the duties of factors, are not disputed. They are not applicable to the present case, which does not depend on any general rules, but on the terms of the contract between the parties. The conduct of the defendants is to be considered in two points of view: first, in regard to the ship; second, as it respects the cargo. Any neglect as to the cargo, would not authorize an abandonment of the ship. The letter of the defendants, of the 23d *July*, 1803, contains their acceptance of the plaintiff's consignment, agreeably to his letter of the 17th *May*. From these two letters, the rights and duties of the parties are to be collected. They constitute the *contract between them. By the terms of these letters, the defendants acquired a *lien* on the ship and

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freight, as a security for their acceptances, and for all their advances and disbursements relative to the ship and cargo. (2 *East*, 227.) It will be seen from the accounts exhibited, that when the ship was despatched from *Liverpool*, the defendants had advanced 1,090*l.* sterling. It appears that the ship could not be sold in *Europe*, and the plaintiff, in his letter of the 29th *May*, says, that if the ship could not be sold to advantage, she was to be sent back. The defendants had discretionary powers, to act as they thought most for the advantage of the plaintiff. The defendants must have either sacrificed the ship by a sale in *England*, or have sent her back. They preferred the latter, as most for the interest of the plaintiff. The vessel was sent back, with the *lien* of the defendants, thereby securing themselves, and pursuing the orders of the plaintiff. Under their power, they assigned the ship to *Lenox & Maitland*, with directions to deliver her to the plaintiff, on his paying the balance due to the defendants. This was a sale in *form* only; an expedient to preserve the *lien* of the defendants, and for the benefit of the plaintiff. It was not a *pledge* of the plaintiff's property. *Lenox & Maitland* were merely constituted the agents of the defendants, for the purpose of preserving their security on the vessel. Such a transfer, merely to preserve the *lien* of the defendants, is not a *tortious* act, which makes them answerable for all consequences. (*M'Combie v. Davies*, 7 *East*, 5. 7.)

Again, the defendants did not send the vessel beyond sea, but home to the plaintiff, on his paying the balance due to them. When the vessel sailed from *Liverpool*, she was, in fact, the property of the plaintiff, who must be answerable for all the repairs which afterwards became necessary. All the letters of the plaintiff show that the defendants were to be made secure, at all events, for all their advances. If they had advised *Wilkins* to insure at *New-York*, and the vessel had been lost during the voyage, they would have lost their security. The insurance may have been made under the first orders, and if so, the defendants *are entitled to the premium. It is true, they were bound to accept the bills, and they may, perhaps, be liable for the damages on the one protested. Had the defendants been limited strictly to the funds of the plaintiff, the vessel would have returned empty. Some cargo was necessary to ballast the ship, and what was done was intended for the benefit of the plaintiff. By loading her with coal instead of salt, the defendants have rendered themselves liable only for the difference between the freight and profit of the two articles, if there is any difference.

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Harison, in reply. The defendants, by accepting the consignment, became bound to pursue the orders of the plaintiff.

By sending the vessel to *New-York*, in the manner they have done, the defendants have parted with their *lien*; they had no authority to send her to any one but the plaintiff, or to such person as he might designate. The defendants could not *sell*, or *pledge* their *lien*, nor could they send the subject abroad, without losing their *lien*. Having undertaken to load the vessel and send her away, contrary to the plaintiff's orders, they must be deemed the owners. The plaintiff had a right to abandon her to the defendants. The acts of the defendants furnish the strongest evidence of ownership; and their letters to *Lenox & Maitland* show that they intended a sale, though they gave an option to the plaintiff, to take the vessel, if he thought proper. The power of a factor over his *lien*, can never authorize such a disposition of the property. The case of *M Combie v. Davies* was very different. As this disposition of the vessel was made before she met with the disaster which obliged her to return to *Liverpool*, the defendants are responsible for all the expenses of repairs; since they have by their conduct made the vessel their own. If the vessel is to be considered as belonging to the defendants, they must also be regarded as owners of the cargo.

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SPENCER, J. The plaintiff in this case claims from the defendants; 1. The damages, interest and cost on the protest *of a bill of exchange for 450*l.* sterling, drawn by the plaintiff, at *Wilmington*, in *North-Carolina*, upon the defendants, residing at *Liverpool*, in *England*, and which bill the defendants, by their letter to the plaintiff, had agreed to accept, in consideration of the plaintiff's having consigned to them a ship and cargo.

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2d. The price for which the defendants sold the ship *Nancy*; and 3d, to be exempted from the premium of insurance made on the ship, goods and freight from *Liverpool* to *New-York*, as also the amount paid by the defendants for the return cargo, being salt and coals, and also the amount of repairs and other expenses, subsequent to the sale of the ship by the defendants to *Lenox & Maitland*.

The defendants' liability to the damages, interests and costs attending the protest for non-acceptance of the bill for 450*l.* sterling, is very properly admitted, and it is, therefore, unnecessary to examine the facts, or the law, as applicable to that point.

That the defendants had a *lien* on the cargo consigned to them, and its proceeds, with a *lien* also on the proceeds of the ship, when sold under the authority conferred by the plaintiff, to the extent of their acceptances and disbursements on the plaintiff's account, cannot be questioned. The only question is, whether the defendants have pursued such a course

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as the general duties of factors require, in relation to the sale of the ship, and so as to preserve their *lien* on the actual proceeds of the sale of the ship by their agents, *Lenox & Maitland*.

If the line of conduct they have observed, made the ship their own, after the transfer of her to *Lenox & Maitland*, it will then necessarily follow, that they have no right to charge the plaintiff with the premium of insurance on the voyage from *Liverpool* to *New-York*, with the amount of the return cargo, or for the repairs and disbursements incurred, after the sale to *Lenox & Maitland*. It is a rule which has been repeatedly recognized in this court, that a factor cannot pawn the goods of his principal. It is a principle so well settled in the *English* courts, and so firmly established *with us, as to render it wholly unnecessary to cite authorities in support of it.

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A *lien* appears, by all the cases, to be a personal right, and can endure no longer than the possession of the party holding it continues. The authority given by the plaintiff to the defendants to sell, did not divest the plaintiff's right of property, at most, it was an authority coupled with an interest in the proceeds, and this authority was exerted by the sale to *Lenox & Maitland*. It has been urged, on the part of the defendants, that this was merely a mode adopted to preserve their *lien* on the proceeds of the sale, and was not incompatible with the authority vested in them to sell the ship, by way of securing themselves for the responsibilities they had incurred. It seems to be a controverted point in the *English* courts, "whether or not a *lien* might follow goods in the hands of a third person to whom it was delivered by the party having the *lien*, purporting to transfer his right of *lien* to the other as his servant, and in his name, and as a continuance, in effect, of his own possession." (7 *East*, 6.)

In the present case, the *lien* was to be acquired by the act of sale only; for until a sale took place, the right of the defendants was merely potential. It has been supposed that the ship itself was put into the possession of the defendants, as a security for their accepting the drafts; this, in my opinion, is neither warranted by the case, nor is it reconcilable with some of the defendants' acts. In the plaintiff's letter of the 17th of *May*, 1803, he says, "The ship will be despatched to your port to your address;" again, "I shall send you a power of attorney to make sale of her, as I mean at all events to make you safe in the acceptance and payment of the bills;" and again, "Thus, I flatter myself, the ship and cargo will be in your possession before you are called on for acceptance." The possession of the ship here spoken of, evidently means such a possession only as would arise from her being addressed to the

defendants with a power to sell, and so the plaintiff must have intended, when he makes the possession in the defendants to be the consequence of these two acts. The actual possession never was *in the defendants prior to their sale; and until the power was executed by a sale, the defendants could have had no legal right to take possession of or to detain the ship. The defendants' refusal to accept one of the bills can be imputed to nothing else than an apprehension on their part, that the funds in their hands were not an adequate security; but if the ship unsold was in their possession, and they had a *lien* on her, there can be no pretence of a want of security.

The power to sell did not admit of a mere formal transfer, for the express purpose of gaining a *lien* on the proceeds, but was alone to be fulfilled by a real, actual, and substantial sale. The sale, therefore, completely divested the plaintiff's right of property and from that moment he had a right to *debit* the defendants with the price specified in the bill of sale.

The defendants are not chargeable with any *mala fides*. Their conduct appears to be fair; but if they are not to be considered as the real owners of the ship, through the medium of their trustees, *Lenox & Maitland*, they have grossly disobeyed their orders in respect to the return cargo.

The property of the ship being, as I conceive, changed by the act of sale, there exists no right to charge the plaintiff for the premium, the return cargo, or the repairs, nor for any thing on, or towards the ship, after the plaintiff's interest in her ceased.

In my judgment, a liquidation must take place on the principles resulting from this opinion.

YATES, J., was of the same opinion.

KENT, Ch. J. Upon the facts contained in the case, the court are called upon to ascertain and prescribe the principles, upon which the accounts and claims between the parties are to be liquidated or adjusted.

1. The plaintiff claims compensation for the injury he received by the non-acceptance and payment of the bill of exchange for 450*l.* sterling. By his first letter of the 17th *May*, he informed the defendants that the ship and cargo *would be consigned to them, and that he should anticipate the avails of the cargo and freight, by drawing upon them to the amount of the three bills. The defendants received this letter, together with the invoice and bill of lading, and agreed to accept the bills. This acceptance of the consignment bound them to pay the bills. This point seems to be well understood and settled; (*Buller, J.*, in 6 *East*, 34.) and the counsel for the defendants admitted, upon the argument, their

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responsibility to indemnify the plaintiff for the non-acceptance and non-payment of the third bill. This indemnity consists in refunding to the plaintiff the 20 *per cent.* damages which he paid on the return of the bill, the costs attending the same, including the costs of the protest, and interest upon the damages and costs so paid from the time they were paid.

2. As to the return cargo from *Liverpool* to *New-York*. The coals were never ordered. In shipping them, the defendants clearly exceeded their special and limited powers, and the plaintiff was not bound to accept of them. The salt was ordered by the letter of the 31st of *May*; but the defendants assigned it to their agents at *New-York*, with unqualified orders to sell it. This was exercising ownership over it, inconsistent with their powers and duty, as factors; and the plaintiff had his election not to accept of the proceeds of the salt, so placed and disposed of without his consent or control. He did refuse to have any thing to do with the proceeds of the cargo, and, consequently, the cargo and the premium paid at *Liverpool* for insuring it, are not to be charged to him.

3. The next and most important point respects the ship. By the first letter of the 17th of *May*, 1803, the plaintiff gave notice to the defendants, in general terms, that he should send them a power of attorney to make sale of the ship, because, he said, that he meant, at all events, to make them safe in the acceptance and payment of the bills. By his next letter, of the 31st of *May*, the plaintiff directed the defendants to cause insurance to be made upon the ship for the return voyage, and this insurance was effected accordingly, *on the 12th of *September* following. The plaintiff did, indeed, by his letter of the 9th of *July*, countermand those orders, for the insurance in *England*, and gave notice that he intended that the insurance on the return voyage should be made at *New-York*. But we have no evidence that this letter was received, prior to the 12th of *September*; and, from the correspondence, I think it is fairly to be inferred, that it was not received. It was incumbent upon the plaintiff to make out, affirmatively, the fact, that these subsequent orders were received in time by the defendants. From the omission of the plaintiff to do this, we are bound to conclude, that the insurance at *Liverpool* upon the homeward voyage, was duly and authoritatively made. The defendants had a *lien* upon the ship, for their advances and responsibilities. The ship was despatched to their address, and by the letter of the 17th of *May*, the plaintiff said, he flattered himself the ship and cargo would be in possession of the defendants, before they were called upon for acceptance. The plaintiff, therefore, intended that the ship should

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be placed in their possession, as a pledge of their indemnity, or, as the plaintiff said, to *make them safe* in the acceptance and payment of the bills; and from the terms of the first letter, we have reason to conclude, that the power was general, and not restricted to any particular place, though the subsequent letters do, undoubtedly, contemplate, that the sale, if made at all, was to be made at *Liverpool*. But the letter of the 31st of *May* supposes a power in the defendants to sell the ship to return to *New-York*; for it says, "If the ship be sold, to return to *America*." Here was then a sale contemplated for the *American market*, if not a sale to a person residing in *America*. Considering the object of the power to sell, and the probable generality of the terms in which it was expressed, the exercise of it, if made in good faith, ought to be construed very liberally in favor of the defendants. But the sale to *Lenox & Maitland* was not an absolute sale. It was, in effect, only a transfer of the *lien* to *Lenox & Maitland*, as agents of the defendants, and with an intent to facilitate a settlement with the plaintiff. Whatever might be the form of the sale, it was understood and declared, both by the defendants and their agents, to be a mere deposit of the *lien* in their hands, on behalf of the defendants. Under such circumstances, I do not consider this as a tortious conversion of the subject, nor a parting with the possession of the *lien*. This appears to be the real intent and obvious meaning of the transaction; and in the opinion of Lord *Ellenborough*, which seems to have been the opinion of the whole Court of K. B. in the case of *M'Combie v. Davies*, (7 *East*, 5.) such a change of the *lien* does not divest the factor of his right. Here was no credit or imposition held out, as in the case of *Kruger v. Wilcox*, (*Amb.* 252.) on which Lord *Hardwicke* laid stress. A factor may deliver the possession of goods, on which he has a *lien*, to a third person, with notice of the *lien*, and with a declaration that the transfer is to such person as agent of the factor, and for his benefit. This is a continuance, in effect, of the factor's possession, and this was precisely the object of the transfer in the case before us, which is much stronger than the one supposed by the K. B.; for here the factor had a general power to sell, and a power given him avowedly for his own indemnity. I see nothing tortious, nor any thing unreasonable in the manner in which the power was exercised in the present instance. What would have been the effect of an absolute sale by *Lenox & Maitland*, is a question not before us, for the one which they made was by consent of the plaintiff, without prejudice to the prior rights of the parties. We are, therefore, to consider the question, as if *Lenox & Maitland* still held the vessel, as agents for the defendants, and as ready to surrender the possession and formal title to the plaintiff, on his giving to the defendants their just indemnity.

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I think, therefore, that the plaintiff is bound to take the avails of the ship, and to pay the premium of insurance, advanced by the defendants for the insurance of the ship and freight, for the homeward voyage. On the other hand, the defendants must assign over to the plaintiff the policy on the ship and freight, and account for any moneys which *they have received thereon, and they must, likewise, pay for the freight of their cargo to *New-York*. As to the expenses and disbursements of the defendants, in fitting out the ship in *September*, and in repairing the damages, and fitting her out again in *November*, they are entitled to have them refunded by the plaintiff; and upon these principles, as to the points in contest between the parties, the accounts must be liquidated.

THOMPSON, J., and VAN NESS, J., were of the same opinion.

Judgment accordingly. (a)

(a) Though a factor may pledge *negotiable paper* belonging to his principal, as a security for his own debt, and thereby bind his principal, unless the latter can charge the party receiving it with notice of the fraud or want of title (*Colins v. Martin*, 1 *Bos. & Pul.* 648. *Treuttel v. Barandon*, 8 *Taunt.* 100.); yet he cannot pledge the *goods* of his principal, it being well settled that such an act is beyond his power. *Martini v. Coles*, 1 *Mau. & Selw.* 140. *Fielding v. Kymer*, 2 *Brod. & Bingham* 639. *Bowie v. Napier*, 1 *M'Cord's Rep.* 1. *Van Amringe v. Peabody*, 1 *Mass. Rep.* 440. *De Bouchout v. Goldsmid*, 5 *Ves.* 211. But a factor, who has goods consigned to him for sale, may put them into the hands of a commission merchant connected with an auctioneer in business, to be sold, and the auctioneer may safely make an advance on the goods for purposes connected with the sale, and as part payment in advance, or in anticipation of the sale, if such be the custom and ordinary usage in such cases. *Laussat v. Lippincott*, 6 *Serg. & Rawle*, 386. If the principal, however, should arm the factor with such *indicia* of property as to enable him to deal with it as his own, and thus mislead others, and the factor pledge it, the principal will be bound. *Boyson v. Coles*, 6 *Mau. & Selw.* 14. See *Pickering v. Burk*, 16 *East*, 43. Sending goods to a factor, to be dealt with according to his discretion, and drawing on him for the amount of the consignment, will not authorize him to pledge the goods, even to raise money to meet the bills. *Graham v. Dyster*, 2 *Stark. Rep.* 21. Nor will a request of the consignor, accompanying the consignment, that the consignee will make remittances in anticipation of sales, give an authority to pledge the goods to raise money to make the remittance. *Queiroz v. Trueman*, 3 *Barn. & Cress.* 342.

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 WIEST
v.
CRITSINGER.
WIEST *against* CRITSINGER.

THIS case arose on a *certiorari*, and was submitted to the court without argument.

The *return* of the justice stated that *Wiest*, the defendant below, was summoned to appear before him at the house of *Griffin Ransom*, to answer to the plaintiff below, (*Critsinger*.) That on the day appointed to appear, the justice could not attend, and sent a note, *but without signing it*, to the house of *Ransom*, adjourning the court to the 7th of *November* following. On the day of the return of the summons, the parties appeared at *Ransom's* house, and remained some time, and the justice not appearing, they went away. On the 7th of *November*, the justice and *Critsinger* attended at *Ransom's*, but the defendant did not appear; and the justice proceeded to hear the proof on the part of the plaintiff, and gave judgment in his favor.

Where the defendant was summoned to appear before the justice on a certain day, at a certain place, and the parties appeared, but the justice did not attend, and sent a written note, adjourning the cause to a further day; on which day he attended with the plaintiff, and the defendant not appearing, the cause was heard on the part of

**Per Curiam.* An adjournment made by the justice, while absent from the place where the court was appointed to be held, and in the absence of the parties, and by a note in writing without his signature, was clearly not an adjournment of which the parties were bound to take notice.

The cause was, consequently, discontinued and out of court. The subsequent proceeding was null, and the judgment must be reversed.

Judgment reversed.

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the plaintiff, and judgment given in his favor, it was held, that the adjournment was irregular, and the defendant not bound to attend further; and that the subsequent proceedings by the justice were null and void.

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REID
v.
LORD.

REID *against* LORD.

A defendant cannot plead in abatement, because of an *alias dictus* subjoined to his name. The true name is that which precedes the *alias dictus*.

THIS was an action of *covenant*. The declaration described the defendant as, "*Samuel P. Lord, junior, otherwise called Samuel P. Lord, junior, and Josiah Barber,*" and stated that the defendant executed the covenant by that name.

The defendant pleaded in *abatement*, and that the bill might be quashed, because he is known only by the name of *Samuel P. Lord, junior*, and never was called, or known by the name of *Samuel P. Lord, junior, and Josiah Barber*. To this plea, there was a general demurrer, and joinder.

Per Curiam. There is no ground for this plea in abatement. The true name is that which precedes an *alias dictus*; (*Sayer*, 279.) and the one which precedes here is precisely the same name which the defendant gives to himself in the plea. The *alias dictus* is taken from the description which the defendant gave of himself in the covenant, and we must take it, that the description is, as it ought to have been, literally copied. An *alias dictus*, as *one of the old cases says, (*Jenk. Cent.* 119.) is only reputation, and is not the truth; and though it might as well have been omitted altogether, yet if it be supported by the covenant, the defendant cannot take an exception. There must be judgment of *respondeas ouster*.

Judgment of *respondeas ouster*

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Feb. 1809.HENDRICKS
v.
FRANKLIN.HENDRICKS *against* FRANKLIN.

THIS was an action brought against the defendant, as drawer of a bill of exchange in favor of *Franklin, Robinson & Co.* on *Rathbone, Hughes & Duncan*, merchants in *Liverpool*, endorsed, by the payees, to one *Townsend*, and by him to the plaintiff.

The bill was protested for non-acceptance and non-payment. In assessing the damages to be recovered by the plaintiff, 2 per cent. was added, over and above the twenty per cent. damages and interest, for the difference of exchange, it being two per cent. above par, when the defendant received notice of the non-payment.

The only question was, whether the plaintiff was entitled to recover the 2 per cent. or the rate of exchange.

Colden, for the defendant. The only question is, whether on a bill drawn in sterling money, on *England*, and returned for non-payment, the holder is entitled to recover at the rate of exchange, or at par only. There is no established rule or custom here that can govern in this case. (2 *Johns. Rep.* 335.) (b) The bill being payable in sterling, which is an imaginary currency, the question is, By what standard is a pound sterling to be measured? The act of Congress, relative to the collection of duties, establishes the value of a pound sterling *at 4 dollars and 44 cents. (*Laws of U. S.* vol. 4. p. 279. s. 61.) Though contained in the act for the collection of duties, the regulation is general. Again, in the act relating to the mint, (vol. 11. p. 37. *Laws U. S.* s. 11.) the proportional value of gold and silver, in all coins current in the *United States*, is fixed at 15 to 1; or 15 pounds of pure silver is made equal, in all payments, to one pound of pure gold. The pound sterling being 20-21 parts of the *English* guinea, whose value, by the law of the *United States*, is fixed at 100 cents for every 27 grains, the exact value of the pound sterling can be ascertained by an invariable standard. This mode appears to have been adopted by Judge *Patterson*. (3 *Dallas*, 349. in note.)

The damages to be recovered on a protested bill of exchange are fixed at 20 per cent. They do not depend on the rate of exchange; but the party is bound to pay in *specie*, or in the same money he received. This rule of damages appears to have originated in *Pennsylvania*. By an act of the assembly of that colony, passed in 1700, it was enacted, "that if any

The holder of a bill of exchange drawn in *New-York* on *Great Britain*, or any other part of *Europe*, and returned protested for non-payment, can recover no more than the contents of the bill, and 20 per cent. damages, with interest, or at the par of exchange. He can recover nothing for the difference between the price of bills, at the time the bill was returned, and the time it was drawn. (a)

(a) *Graves v. Dash*, 13 *Johns. Rep.* 17. *Wendell v. The Washington and Warren Bank*, 5 *Conn. Rep.* 161.

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person or persons, within that province or its territories, shall draw or endorse any bill or bills of exchange, upon any person in *England*, or other parts of *Europe*, and the same be returned unpaid, with a legal protest, the drawer thereof, and all others concerned, shall pay or discharge the contents of such bill or bills, with 20 per cent. damages thereof, and so proportionably for greater or lesser sums, in the same specie as such bill or bills were drawn, or current money of the province, equivalent to that which was first paid to the drawer or endorser." (*Francis v. Rucker and others, Ambler*, 672.)

[* 121] A similar law existed in *Rhode-Island*, (a) which fixed the damages on protested bills at 10 per cent. The rule established by the law of *Pennsylvania*, was early adopted in the state of *New-York*, where it has been the invariable practice ever since.

A similar usage prevails in *England*, in regard to bills drawn on *India*. Where a bill is returned protested from *India*, it is the constant practice to allow ten shillings *per pagoda*, which includes interest, re-exchange, and all other charges. (*Auriol v. Thomas*, 2 Term Rep. 52.) No question is made about the rate of exchange. The rule here, fixing the damages at 20 per cent. was adopted, instead of any demand for re-exchange, which it would have been difficult, if not impossible, to ascertain; for such is the course of trade between *Great Britain* and the *United States*, and between *Great Britain* and *India*, that merchants in *Great Britain* can very rarely have occasion to draw bills on this country, or on *India*.

It may be said, that the money is to be remitted to *England*, and that, therefore, the holder has a right to purchase another bill here; but that is not the case. When a bill is dishonored in *England*, the holder has a right to *redraw* on the person who remitted the bill, or to purchase a bill there, and the difference or premium he would have to pay, would be the *re-exchange*; and it is to avoid all questions about this re-exchange, that the 20 per cent. damages are allowed here. The drawer of a protested bill is to pay the contents of the bill, and the 20 per cent. with interest, in the current money of the *United States*. He has no concern with any rate of exchange. To show how unreasonable and inconvenient the present demand

(a) By an act of the colony of *Rhode-Island*, passed in 1743, and included in the revised laws of the state, in 1776, it is enacted "that when any bill or bills of exchange shall be returned from any parts beyond sea, duly protested for non-acceptance or non-payment, the person or persons to whom the same was or were payable, shall be entitled to have and recover of the drawer or drawers, endorser or endorsers, of such bill or bills, *ten per cent.* damages, over and above the principal sum for which such protested bill or bills was or were drawn, and also lawful interest from the time such bill or bills of exchange so protested were purchased, until final judgment for the same be obtained, and also the legal charges of protesting said bill or bills, with costs of suit." *Brown v. Van Braam*, 3 Dallas, 344, 346.

is, suppose a person purchases a bill for 100*l.* sterling on *London*, at 50 per cent. above par, for which he pays 666 dollars and 66 cents, and when the bill is returned, the rate of exchange should continue the same, the drawer would be obliged to pay 888 dollars and 88 cents; but if the exchange should happen to be 50 per cent. below par, when the bill is returned, he would have to pay only 270 dollars and 20 cents.

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HENDRICKS
v.
FRANKLIN.

**Brinkerhoff*, contra. The plaintiff claims the 2 per cent. or the rate of exchange, on the authority of a long established and invariable usage among merchants. By the regulations of the chamber of commerce in this city, published many years ago, when a bill is returned protested from *Europe*, the drawer is to pay, not only the 20 per cent. damages but the *rate of exchange*. The money is to be paid in *sterling*, and the value of that sterling is the price which a bill costs at the time when the bill is returned.

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Colden, in reply. The regulations of the chamber of commerce are of no legal authority. They do not establish any custom or usage which can have the force of law. That institution has no binding authority, nor are its regulations to be regarded in a court of law.

It is not to be presumed, that another bill is always to be purchased and remitted in the place of the one returned. The presumption should be, that the holder in *Europe* redraws on this country for the amount. It is probable, often, that the creditor is here, and means to stay here; there would be no justice, then, in paying him the 20 per cent. damages, and 8 per cent. more for the price of bills above par.

SPENCER, J., delivered the opinion of the court. In this case, the question is, what damages the plaintiff, who is the endorsee of a foreign bill of exchange, of which the defendant is the drawer, and which was returned protested for non-acceptance and non-payment, is entitled to recover; the plaintiff contending, that he has a right to recover, as well the principal and interest, as also 20 per cent. damages, and an additional 2 per cent. as the difference of exchange, between the time of negotiating the bill, and notice of the non-payment to the defendant, by way of reëchange. The payment of this 2 per cent. the defendant resists.

The right to recover 20 per cent. damages on the protest of a foreign bill of exchange, rests with us on immemorial *commercial usage, sanctioned by a long course of judicial decisions. In *Great Britain* (2 *H. Bl.* 378.) there is no such

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usage, and hence, there the difference of exchange is always taken into consideration, and their courts of justice allow for the usual rate of reëxchange upon the protest of a foreign bill. In *Pennsylvania*, as early as the year 1700, the legislature enacted, that if any person within that province should draw or endorse any bill of exchange upon any person in *England*, or other parts of *Europe*, and the same be returned back unpaid, with a legal protest, the drawer and all concerned should pay the contents of the bill, together with 20 per cent. advance for the damage thereof, in the same specie as the bill was drawn, or current money of that province, equivalent to that which was first paid to the drawer or endorser. It is presumed, that our rule to allow 20 per cent. on the protest of a foreign bill, was originally coëxtensive with the rule thus established in *Pennsylvania*, and that the same reasons induced both rules. (a) The 20 per cent. was in lieu of damages, in case of reëxchange, and because there was no course of exchange from *London* to *New-York*, and to avoid the constant uncertainty and fluctuation of exchange. If these were not the inducements to the allowance of such very heavy damages as 20 per cent., I confess myself unable to discover them. It certainly could not be intended merely as a mulct, nor with any other view than to remunerate the party for all his damages in being disappointed in the honoring of his bill. It is not pretended, that this claim for a reëxchange, or more properly for the difference in the price of bills at one time and another, has ever been recognized in this state, by any judicial decision. The chamber of commerce, it seems, provide, in their regulations, for this difference in the price of bills, between the time a bill has been purchased, and notice of its dishonor; and I understand that merchants regulate themselves by the rules of the chamber of commerce. This, however, cannot make the law; the usage is too recent, and too unsupported by judicial countenance, to produce the consequences contended for. I understand that it has invariably *been the practice of the clerk of this court, in assessing dam-

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(a) The rate of damages to be allowed and paid upon the usual protest for non-payment of bills of exchange drawn or negotiated within the state of *New-York* is as follows:—1. If such bill shall have been drawn on any person or persons at any place in either of the states of *Maine*, *New Hampshire*, *Vermont*, *Massachusetts*, *Rhode-Island*, *Connecticut*, *New Jersey*, *Pennsylvania*, *Ohio*, *Delaware*, *Maryland*, or *Virginia*, or in the *District of Columbia*, three dollars upon the hundred, upon the principal sum specified in such bill. 2. If such bill shall have been drawn upon any person or persons at any place in either of the states of *North Carolina*, *South Carolina*, *Georgia*, *Kentucky*, or *Tennessee*, five dollars upon the hundred upon the principal sum specified in such bill. 3. If such bill be drawn upon any person or persons at any place, or in any other state or territory of the *United States*, or at any other place on, or adjacent to, this continent, and north of the equator, or in any *British* or other foreign possessions in the *West Indies*, or elsewhere in the *Western Ocean*, ten dollars upon the hundred, and upon the principal sum specified in such bill. 4. If such bill shall have been drawn upon any person or persons at any port or place in *Europe*, ten dollars upon the hundred, upon the principal sum specified

ages on protested bills, to give the principal, interest, and 20 per cent. damages, and no more. In my opinion, the 20 per cent. is in lieu of all claim for damages in such cases, and the claim for the difference in the price of the bills cannot be supported, and, therefore, it must be deducted in this case. (Chit. 300. 2 H. Bl. 378. Amb. 674. 2 Term Rep. 52.)

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Judgment accordingly.

in such bill. Such damages shall be in lieu of interest, charges of protest, and all other charges incurred previous to and at the time of giving notice of non-payment; but the holder of such bill shall be entitled to demand and recover lawful interest upon the aggregate amount of the principal sum specified in such bill, and of the damages thereon, at the time at which notice for non-payment shall have been given, and payment of such principal sum shall have been demanded. 1 Rev. Laws, 770, 771.

MARTIN and others *against* FRANKLIN and others.

THIS was an action of *assumpsit*, for goods sold and delivered, and on an *insimul computassent*. The plaintiffs are merchants in *Liverpool*, and it was admitted that the debt was contracted in *Great Britain*, that the accounts between the parties is in sterling, and that the interest is calculated at 5 per cent. the legal interest in *Great Britain*. In the declaration, all the counts, except the last, state the defendants as being indebted to the plaintiffs in the city of *New-York*, and the last count lays the venue in *New York*, but does not mention any particular place at which the defendants were indebted.

It was admitted to be a general practice among merchants, that when debts contracted and due in *Great Britain* are paid in *New-York*, to pay according to the current rate of exchange, whether it be above or below par, though there seemed to be some diversity of opinion and practice on the subject.

In calculating the damages in this case, six per cent. was included, besides the interest, being the rate of exchange above par, at the time the suit was brought. The only question was, whether the plaintiffs were entitled to recover the six per cent. or whether the debt was to be *paid at the par of exchange. The case was argued by *Brinkerhoff*, for the plaintiffs, and *Colden*, for the defendants; and the same course of reasoning was pursued, as in the last case of *Hendricks v. Franklin*.

When a person in *New-York* purchases goods in *England*, and is sued here, the creditor can recover the amount, at the par of exchange only, and is not entitled to any allowance for the rate of exchange, or for the price of bills on *England*.

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Brinkerhoff observed, that in this case it was a debt contracted in *England*, and that, therefore, the plaintiff, being

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entitled to his money there, ought to be allowed the price of bills, or rate of exchange it would cost to remit the money to that country.

Colden said, in reply, that its being a contract for the purchase of goods in *England*, could not vary the rule. It is the same case, as that of every other debt contracted in a foreign country, and sued for here, where the creditor must receive payment in the current money of the country. The debtor has nothing to do with the rate of exchange.

Per Curiam. The debt is to be paid according to the par, and not the rate of exchange. It is recoverable and payable here to the plaintiffs or their agent; and the courts are not to inquire into the disposition of the debt, after it reaches the hands of the agent. He may remit the debt to his principal abroad, in bills of exchange, or he may invest it here on his behalf, or transmit it to some other part of the *United States*, or to other countries, on the same account. We cannot trace the disposition which is to take place, subsequent to the recovery, nor award special damages upon such uncertain calculations. All that the plaintiffs can ask, is their debt, justly liquidated and paid, in the lawful currency of the *United States*.

Judgment accordingly

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*M'LEOD against JOHNSTON.

THIS was an action of *assumpsit*. The cause was tried before Mr. Justice *Van Ness*, at the sittings in *New-York*, on the 10th *June*, 1808.

At the trial, *William Donaldson* and *James Main* were produced as witnesses on the part of the plaintiff, and were objected to by the defendant as interested, but were admitted by the judge. From their testimony the following facts appeared. *Donaldson* and *Main* were indebted, as joint endorsers of a bill of exchange on *Glasgow*, to the plaintiff, which bill had been protested, and amounted, with the damages, to 2,789 dollars and 83 cents. Part of the amount was paid, and to secure the residue, the plaintiff gave a power of attorney to the defendant, to attach certain moneys in the hands of the defendant and one *Burk*, who resided at *New-Orleans*, and were partners, under the firm of *Johnston and Burk*, belonging to *Main*, and which had been recovered by them on an attachment, issued in 1805, in favor of *Main* against one *M' Cullock*. In *January*, 1806, *Johnston* was at *New-York*, and told *Main* that he had not yet collected all the money on the attachment against *M' Cullock*, but that he would have the whole soon, and that *Main* might draw on him for the amount at *New-Orleans*; and suggested that the plaintiff might attach it in his hands, for the balance due to him from *Donaldson* and *Main*, on the bill of exchange; to which *Main* replied, that the debt was justly due to the plaintiff, and if he attached the money in the hands of the defendant and *Burk*, he would not interfere, and had no objection to it. The defendant went to *New-Orleans*, and returned again to *New-York* in *November*, 1806, where he delivered to *Main* an account, dated the 7th *October*, 1806, and signed for himself and *Burk*, in which *Main* was credited the sum of 989 dollars and 50 cents, and after deducting charges for advice, postage and commissions, they admitted a balance in their hands of 877 dollars and 36 cents, to answer *the attachment laid by the plaintiff against *Main*. He, at the same time, told *Main* that he had the money or property, but which the witness did not recollect; but when he was in *New-York* before, he said that a part of the property of *M' Cullock*, which had been attached, was sold on a credit. The present suit, which was commenced in *December*, 1806, was brought to recover the balance stated in the account as due to *Main* from the defendant, and held by him to the use of the plaintiff. *Donaldson* and *Main* both declared that

D. and M., being indebted to C., he attached money in the hands of B., in *New-Orleans*, belonging to M. In an action brought by C. against B. for the money so attached, and held by him to answer to C., it was held, that D. was a competent witness for the plaintiff; for though the recovery of the plaintiff would so far go in discharge of the debt due by the witness, yet he would be liable over for the same amount to M., so that his interest was balanced between the parties. Whether M. is a competent witness for the plaintiff? *Quere.*

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they had no claim on the money in the hands of the defendant; that it belonged exclusively to the plaintiff, and that they had no concern in the attachment issued by him, which was prosecuted solely for his benefit.

The account above-mentioned was also proved, and read in evidence to the jury. No witnesses were produced by the defendant.

The judge charged the jury, that the plaintiff was entitled to recover the balance stated in the account with interest. The defendant's counsel insisted, that the defendant was entitled to a deduction of a commission on the amount; and the judge told the jury that the defendant ought to have produced some proof as to the commissions, and not leave it to conjecture; but if they thought him entitled to a commission, and could take upon themselves to ascertain the amount, they might allow what they thought proper. The jury found a verdict for the plaintiff for the balance, as stated in the account between the defendant and *Main*, with interest.

The defendant moved to set aside the verdict.

J. Radcliff, for the defendant. 1. *Donaldson* and *Main* were incompetent witnesses. Both were interested, as the effect of the recovery in this case is to discharge their responsibility to the plaintiff, to the amount recovered. *Main* was particularly interested to establish this fund, in the hands of the defendant, arising from the attachment against *M' Cullock*. This is not the case of an agent or factor, who may be a witness from necessity, or because his interest is balanced between the parties. Here the principal himself is *produced to fix the responsibility of his agent, and charge him with a certain amount.

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2. The rights of the parties must be taken as they stood at the time the suit was commenced. It does not appear that, in *December*, 1806, the money under the attachment was actually received by the defendant. Some of the property attached was not sold, and the residue had been sold on a credit; but whether the money was in the hands of the defendant, was not proved.

3. But admitting that the defendant had received the money, the plaintiff has not established his right to it, for he has not shown that there has been any decision on the attachment issued by him; and until that is done, he cannot have a right to the property attached, or its proceeds.

4. As agents or factors, the defendant was entitled to a commission or compensation for his services, which ought to have been allowed by the jury.

Slosson and *Johnson*, contra. 1. A person who is liable to

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one or other of the parties, which ever way the cause is decided, is a competent witness; for his interest being exactly balanced, he stands indifferent. The interest which renders a witness incompetent must be a direct, certain, and preponderating interest. (*Ilderton v. Atkinson*, 7 Term Rep. 480. *Evans v. Williams*, *ibid.* in notes, 481. *Birt v. Kershaw*, 2 East, 458. *Milward v. Hallett*, 2 Caines, 77. 2 Johns. Rep. 394.) For whatever money is taken by this action, from the fund of *Main*, in the hands of the defendant, *Donaldson* would be liable for. *Main* would have a legal claim, *pro tanto*, against him. His interest, therefore, was balanced; what he might gain on one side, he would lose on the other. *Main* stands equally indifferent. If the plaintiff should recover, it is true, he would be credited to the extent by *Donaldson & Co.* on account of the bill, but he would be a loser of the same sum, it being his money in the hands of the defendant as his agent.

2. The account exhibited by the defendant before the suit was commenced, is an express admission that he has the money in his hands; and it is proved, that in *January*, 1806, he authorized *Main* to draw on him for the amount, though he had not received the whole.

*3. The account delivered by the defendant in *November*, 1806, substantially admits the fact, that the attachment in *New-Orleans*, by the plaintiff, had been decided in his favor. Besides, *Main* expressly relinquished all claim to the money, and admitted the debt due to the plaintiff, for which the attachment was brought.

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If the testimony of *Donaldson* and *Main* should be rejected, yet the account exhibited by the defendant is sufficient to charge him with so much money received to the use of the plaintiff.

4. The defendant ought to have proved that he was entitled to a compensation; as he produced no evidence, the jury were not bound to allow commissions. They were, however, directed to allow commissions, if they thought proper, and it was a fact for the jury to decide.

YATES, J., delivered the opinion of the court. It is a general rule, that the testimony of a witness who might be a gainer or loser by the event of a cause, must be rejected. This interest, however, to produce a disqualification, (*Peake's Evidence*, 171. and 1 Term Rep. 163.) must be vested, or certain, and not remote, possible, or contingent. (a) I think *Donald-*

(a) To render a person incompetent to give evidence, on the ground of interest, there must be a direct interest; that is, he must be immediately benefited

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son's evidence is of the latter description, His interest is completely neutralized. Whatever amount is recovered in this suit, and credited to his account by the present plaintiff, he is liable for to *Main*, to whom the money received on the attachment belongs, and who, of course, is liable for his proportion of the debt only, so that no bias can be presumed to exist on the mind of this witness, thus standing perfectly indifferent between the parties. (a)

or injured by the event of the suit; or the verdict to be obtained by his evidence, or given against it, must be evidence for or against him in another action, in which he may be afterwards a party. *Hayes v. Grier*, 4 Binn. 83. *Bliss v. Thompson*, 4 Mass. Rep. 488. *Page v. Weeks*, 13 Mass. Rep. 199. *Owens v. Speed*, 5 Wheat. 420. Therefore, if the witness be interested in the question, but not in the verdict, it goes to his credit, and not to his competency. *Wakely v. Hart*, 6 Binn. 319. *Cornog v. Abraham*, 1 Yeates, 84. *Henrie v. Maswell*, 5 Halst. Rep. 297. *Evans v. Evans*, 7 Wheat. Rep. 356. And the interest in the verdict must be a direct and certain, not a remote, contingent or consequential interest. *Ely v. Forward*, 7 Mass. 25. *Phillips v. Bridge*, 11 Mass. Rep. *Bean v. Bean*, 12 Mass. Rep. 20. *Fernsler v. Carlin*, 3 Serg. & Rawle, 132. *Lewis v. Manty*, 2 Yeates, 200. But the amount of it is immaterial. *Scott v. McClellan*, 2 Greenl. Rep. 199. Therefore an attorney or counsel, who is concerned in a cause, may be a witness, though his judgment fee depends on his success, (*Newman v. Bradley*, 1 Dall. 240.) or he expects to receive a larger fee from his client in case the latter succeeds. *Miles v. O'Hara*, 1 Serg. & Rawle, 32. A person who thinks himself interested, though in fact he is not so, is a competent witness. *Long v. Baillie*, 4 Serg. v. Rawle, 226. *Fernsler v. Carlin*. And an honorary engagement, which cannot be enforced at law, will not render a witness incompetent. *Long v. Baillie*. Where a person renders himself interested by a voluntary act, for the purpose of depriving a party of the benefit of his testimony, he may be compelled to be a witness. *Long v. Baillie*. *Simons v. Payne*, 2 Root, 406. An inhabitant of a state, where that state is a party, is a competent witness for the state on the trial of the action, notwithstanding any interest he may have as such inhabitant in the result of the cause. *Connecticut v. Bradish*, 14 Mass. Rep. 296. So a taxable inhabitant, not actually assessed, is a competent witness for the commonwealth on an indictment for selling liquor. *Commonwealth v. Baird*, 4 Serg. & Rawle, 141. *Canning v. Pinkham*, 1 New Hamps. Rep. 353. And liability to an action is no disqualification of a witness. *State v. McDonnell*, 1 Coxe, 332.

(a) Where a witness is in every event liable, and his testimony is to determine to which of the parties he is liable, he is a competent witness for either of them. *Emerson v. The Prov. Hat Manuf. Company*, 12 Mass. Rep. 237. *Stump v. Roberts*, 1 Cooke's Rep. 140. *Harwood v. Murphy*, 4 Halst. Rep. 215. And a witness who is equally liable to an action by both parties is a competent witness for either. *Nessley v. Swearingen*, *Addis*. Rep. 144. So a witness is competent in a patent cause, though he is sued, in another action, for an infringement of the same patent. *Evans v. Hettich*, 7 Wheat. 453. But the defendant cannot call a person as a witness, when the plaintiff has contracted that a debt due by the person proposed to be called, shall be reduced if the defendant recovers a verdict. *Robinson v. Eldridge*, 10 Serg. & Rawle, 140. If a witness be interested against the party producing him, he will be competent to testify; for he may, if he consent, testify against his own interest; and after he is sworn in chief, the other party may cross-examine him as to all matters pertinent to the issue then on trial, although the witness, as to these matters, be interested to testify in his favor. *Webster v. Lee*, 5 Mass. Rep. 334. *Barker v. Prentiss*, 6 Mass. Rep. 430. But a person cannot be compelled to testify against a party in an action, in whose favor he is interested. *Webster v. Lee*. *Appleton v. Boyd*, 7 Mass. Rep. 131. And a witness cannot excuse himself from giving testimony, on the ground that he is called to swear against his own interest. *Stoddart's Lessee v. Manning*, 2 Har. & Gill, 147. *Baird v. Cochrane*, 4 Serg. & Rawle, 397. *Nass v. Van Swearingen*, 7 Serg. & Rawle, 192.

I must confess that I have doubts as to the competency of *Main*. It is true, as was contended, if the plaintiff recovers, he must be credited to that amount by the *company*; and if he fails, the defendant still continues responsible to him. In this respect his interest may be balanced; but his testimony went also towards a liquidation of his own demand as to the amount recovered on the attachment *against *M^c Cullock*, by *Johnston* and *Burk*, and to create a fund in the hands of the defendant. On this ground his competency, I think, may be questioned. The amount, however, recovered on this attachment is sufficiently ascertained by the account admitted to have been delivered by the defendant to *Main*, before the commencement of this suit, and by which the sum in the hands of *Johnston* and *Burk* is expressly stated, and from which we have reason to infer that the proceedings on the attachment had terminated, (as nothing to the contrary appears,) and more especially, as there is a specific charge in the account, so rendered to *Main* by the defendant, for commissions, to which he could only be entitled on the actual receipt of the money; so that, without the testimony of *Main*, sufficient appears to enable the plaintiff to recover in this cause. As to the commissions of 5 *per cent.*, it was his duty to have exhibited this charge properly to the jury; not having done this, he cannot complain. The court are, therefore, of opinion, that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

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BOLTE *against* VAN ROOTEN.

Form of a return to a commission to take the examination of witnesses, when sufficient.

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THIS was an action of *assumpsit*. Plea, the general issue. The cause was tried at the sittings in *New-York*, before the *chief justice*, on the 14th day of *April*, 1808. The plaintiff offered in evidence, to support his action, the return to a commission regularly issued under the seal of this court. The caption to the depositions was in the words following, viz. "*William Hobbins* being produced, sworn, and examined as a witness, on interrogatories, to him administered in virtue of and under a commission issued out of and under the seal of the Supreme Court of Judicature of the state of *New-York*, one of the *United States of America*, to *James P. Boyd*, *Christian Mayou*, and *Alexander Boyd*, of the city of *Baltimore*, and state of *Maryland*, directed, in a certain cause now depending, and at issue in the said court, wherein *John Bolte* is plaintiff, and *Peter Van Rooten* is defendant, as follows, to wit: *Imprimis*, to the first interrogatory," &c. The depositions did not contain any other evidence of their being sworn, except what is thus contained in their caption; but at the foot of each deposition, the name of the witness was signed on the right hand side, and on the left, *two of the commissioners subscribed their names, as acting commissioners, without stating "sworn."* On the back of the commission was also endorsed, "*the execution of this commission appears by the schedule annexed;*" which endorsement was signed by the two commissioners, who executed the commission, and who signed the same endorsement, *as acting commissioners*. The interrogatories and the answers were annexed to the commission, and duly transmitted to this court.

The defendant objected to the reading of the testimony, because it did not appear, by the return, that the witness, therein named, had been sworn by the commissioners, and because the commissioners do not certify, that they caused the examinations to be reduced into writing. The plaintiff, having no other testimony, the defendant moved for a nonsuit; but the judge refused to grant a nonsuit, and permitted the testimony to go to the jury, with liberty to the defendant to reserve the point for the consideration and judgment of the court. The jury, thereupon, found a verdict for the plaintiff.

C. Graham, for the defendant, relied on the case of *Bailis v. Cochran*. (2 *Johns. Rep.* 417.)

I. T. Irving, contra.

Per Curiam. There is a material difference between the facts in this case, and those in the case of *Bailis v. Cochran*. (2 *Johns. Rep.* 417.) In that case, the deposition had no caption or conclusion, by which it could appear before whom, and by what authority it was taken. The commissioners signed their names under that of the witness, without *even stating that they were commissioners. But in this case it is stated, that the witness was sworn and examined, *by virtue of the commission directed to the commissioners, by name*, and they then sign their names, at the bottom of the deposition, *quasi* commissioners. This is giving authenticity to the proceeding. If the witness was sworn and examined under that commission, and that fact be certified by the commissioners, as acting commissioners, he must have been sworn and examined *by them*. There is no other meaning to be put upon the words. It is not a thing of inference, but equivalent to a direct averment of the fact. The commissioners do not certify, that the examination was reduced to writing by them, or at their instance; but if he was sworn and examined by them, and they sign the instrument, it must be taken to be an examination reduced to writing under their direction, or by their own act. This is the conclusion of law, upon such a fact.

The defendant must, therefore, take nothing by his motion.

Motion denied.

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HAFF against THE MARINE INSURANCE COMPANY.

Where a vessel was insured, and during the voyage was surveyed, and condemned as not worth the expense of repairs, and the insured offered to abandon for a total loss, it was held, that

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the survey was a necessary part of the preliminary proof to be exhibited to the insurers, and ought to have been produced to them with the other documents, before the commencement of the action, or some account given why it was not produced. (a)

(a) See *Griswold v. National Insurance Company*, 3 Conn. Rep. 96.

THIS was an action on a policy of insurance on the schooner *Lucy*, "at and from *New-York* to a port in *North Carolina*, and at and from thence to *Port Antonio* and *Anotta Bay, Jamaica*," dated 17th June, 1806, valued at 3000 dollars. The policy had the usual survey clause; "That if the vessel, upon a regular survey, should be declared *unseaworthy*, by reason of her being unsound or rotten, or incapable of prosecuting her voyage on account of her being unsound or rotten, then the assurers should not be bound to pay their subscription on the policy." The loss was averred to be by the perils of the sea. The suit was commenced the 13th February, 1807. The plaintiff proved property in the schooner, and that she sailed from *New-York* on the voyage, and arrived at a port in *North Carolina*, and proceeded from thence to *Port Antonio*, in *Jamaica*, where she arrived in distress on the 1st October, 1806. On the voyage from *North Carolina*, she met with heavy and dangerous seas and storms, and received great injury, so that she could not further prosecute her voyage to *Anotta Bay*, without great repairs, which could not be had at *Port Antonio*; and if they could have been had, they would have cost more than the schooner would have been worth, when repaired. The schooner was accordingly condemned at *Port Antonio*, and sold for 528 dollars and 88 cents net, which sum was received by the plaintiff and credited to the defendants.

The plaintiff abandoned, after notice of the loss, on the 27th December, 1806, and gave this evidence of preliminary proof, viz. that when the written abandonment was delivered to the defendants, certain papers were also delivered, of which the witness did not know the contents; that on the 28th January, 1807, the same witness went again with the plaintiff to the defendants, and the plaintiff asked if the defendants had agreed to accept the abandonment, and they answered, No; the plaintiff asked if any other papers or documents were wanting, and they answered, that *nothing was wanting but the survey*. The defendants moved for a nonsuit, for the insufficiency of the preliminary proofs; but a verdict was taken for the plaintiff, reserving the point for the opinion of the court.

J. Radcliff, for the plaintiff. This is a question as to the sufficiency of the preliminary proof. This kind of proof arises from a peculiar clause in the policies of insurance of this state, by which the insurers stipulate to pay the loss, in thirty days

after proof thereof. The insured ought not to be held to strict proof. If he exhibits documents enough to show, *prima facie*, that a loss has happened, *and that the insurer is responsible, that is all that can be required. (*Talcot v. Marine Ins. Co. 2 Johns. Rep. 136.*) The objection made, that the survey was not exhibited with the other documents, ought not to prevail. The survey relates to the seaworthiness of the vessel, and goes to the defence on the merits before the jury. The interest and loss were fully and satisfactorily proved by the other papers delivered to the defendants.

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Colden, contra. The clause in the policy, that if the vessel, upon a regular survey, should be declared unseaworthy, by reason of her being unsound or rotten, the insurer should not be bound to pay, &c., has been lately introduced into our policies. (a) It must, therefore, vary the practice as to the preliminary proofs. In regard to this clause, the survey was an important and essential document, to enable the defendant to decide, whether they ought to accept the abandonment, and pay the loss.

THOMPSON, J., delivered the opinion of the court. The question which this case presents, relates to the sufficiency of the preliminary proof. Although the objection is, in some measure, a formal one, yet, if well taken, we are bound to give it effect. The documents required by the underwriters, as a part of the preliminary proof, was a survey of the vessel, after she had met with the disaster, and the voyage broken up at *Port Antonio*. By the policy it is agreed, "that if the vessel, upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage, on account of her being unsound or rotten, then the assurers shall not be bound to pay their subscription." The circumstances stated in the case will, I think, warrant me in assuming it as a fact, that a regular survey of the vessel was made at *Port Antonio*. It was ascertained at that place, that the schooner would require "great and *extensive repairs;" and she was there *condemned*. These circumstances necessarily imply a survey duly made and certified, and it is to be presumed, *prima facie*, to be in the possession of the plaintiff. It is always made at the instance and for the benefit of the owner or master of the vessel, and it goes, of course, into his hands. When this survey was called for, in the present case, by the defendants, the plaintiff made no answer; at least, none is stated. If it was not then in his

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(a) A similar clause is to be found in the policies of insurance used in *Maryland*. See *Marine Insurance Company of Alexandria v. Wilson*, (3 Cranch, 187.) in which the Supreme Court of the United States were of opinion, that the report of surveyors that the vessel was unsound and rotten, but not referring to the commencement of the voyage, was not conclusive.

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possession, or under his command, he would naturally have accounted for its non-production; and if the inferences which I draw were not correct, the plaintiff should have shown by proof, upon the trial, what was the real fact relative to the survey.

The question then arises, whether the assured who abandons a vessel to the insurer, on the ground that she had received injuries by perils of the sea, which rendered her unable to prosecute her voyage, and which would have cost more than she was worth to repair her, and who had in his possession the survey upon which she was condemned, is not bound to produce it to the insurer who calls for it, as part of the *preliminary proof*. By the usual clause in our policies, the underwriter is to pay, within a certain time, after proof of interest and loss; and we have heretofore considered this stipulation as satisfied by the exhibition of the usual documentary evidence, such as the *register, invoice, protest, &c.*, since the object of it was only to furnish reasonable information to the insurer, that a loss had happened for which, according to the terms of the policy, he was responsible. In the present case, the underwriters did not stipulate to become answerable for any loss which should happen by reason of unsoundness or rottenness, and a survey was the document by which that was to be ascertained. It is possible that this survey might have shown, that the schooner was unable to prosecute her voyage, on account of her being unsound or rotten, which would have been sufficient, at least *prima facie*, to exonerate the underwriters. Good faith, and the true spirit and intention of the clause, requiring preliminary proof of loss, required *the plaintiff to disclose, at least, all the documentary evidence in his possession, touching the nature and extent of the loss. The plaintiff contends, that the injury the vessel had received, was so extensive as to give him a right to abandon, and recover, as for a total loss. The survey must have been a material document to the insurers, in forming their judgment, whether the loss claimed was really total, because it is the opinion of competent judges, formed upon the spot, as to the state and condition of the vessel, and the extent of the requisite repairs. No good reason appears for withholding it in the present instance. The very fact of not producing it, was calculated to awaken suspicion. We are, accordingly, of opinion, that the plaintiff was bound to produce it, or give some account of its non-production, and that he ought accordingly to have been nonsuited upon the trial, and that a nonsuit be now awarded, upon the point reserved.

Judgment of nonsuit.

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S. BROWNELL.

W. EVERTSON moved for a rule on the Court of *Common Pleas* of *Dutchess* county, to show cause why a *madamus* should not issue, commanding them to vacate a rule entered in that court, setting aside a judgment and execution in this cause, which was an action on a *bail-bond* in that court. From the affidavits which were read, the following facts appeared. *J. Brownell*, having been arrested in the court below, gave bail to the sheriff, and special bail not having been put in, the plaintiff commenced the action on the *bail-bond*. The writ was returnable in *March* term, 1808, and the sheriff returned the defendants taken. In *June* term, 1808, a final judgment was entered, and perfected, and in *July* following, a *feri facias* issued. In *October* term, 1808, the defendants moved the court below to set aside the judgment and execution upon terms. The *affidavits on which the notice was founded stated that the writ in the original action was returnable in *January* term, 1808, and that *S. Brownell* was bail to the sheriff; that some time before *March* term, the plaintiff informed the defendant, that he did not intend to prosecute the suit any further; and in *March* term, again told the defendant that he would not further prosecute the suit against him. From what the plaintiff said to him, the defendant supposed that special bail would not be necessary in the original suit, and he so informed *S. Brownell*, the bail to the sheriff. The suit on the *bail-bond* was commenced a short time before the *March* term; but the bail to the sheriff, in consequence of the information of the defendant, that the plaintiff had promised to stop all further proceedings, which he believed to be true, omitted to enter special bail, and pay the costs of the *bail-bond* suit, as he, otherwise, would have done. Neither the defendant in the original action, nor the bail, knew that a judgment had been entered on the *bail-bond*, or of any further proceedings in the suit after the *March* term, until the

The courts of common pleas may set aside a regular judgment by default, where there has been any fraud, or surprise, especially in a bail-bond suit.

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execution. The writ of inquiry in the original suit was executed in *June* term, but the defendant had no notice of it.

The plaintiff produced a counter affidavit, in which he denied that he had any conversation with the defendant, that would justify the allegations, in the defendant's affidavits, and that he never promised, or told the defendant that he would stop the suit against him, or the *bail-bond* suit. No attorney was employed by the defendant in the original suit.

On reading these affidavits, the court below ordered the judgment and execution to be set aside, on payment of the costs in the *bail-bond* suit, and filing special bail in the original action. It appeared, that there was a rule of the court below, which had existed for several years, that no private agreement, or consent, between the parties, in respect to the proceedings in a cause, should be alleged, unless in writing, and signed by them. In giving their reasons for setting aside the judgment, the court below *declared that they should not regard the rule, as they could repeal it, and that if the rule was in force, still the case then before them was founded in the mistake and misapprehension of the defendants, and the rule was not applicable.

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Evertson contended, that the Court of *Common Pleas* had no power to set aside a regular verdict, and grant a new trial, nor could they set aside a regular judgment; whether that judgment be on a *bail-bond*, or in any other suit. He cited *The People v. The Justices of Chenango*, and *The People v. The Justices of Delaware*, (1 *Johns. Cases*, 179, 181.) to show the powers of the courts of sessions and common pleas; and that a *mandamus* was the proper remedy in this case.

Foot, contra.

KENT, Ch. J., delivered the opinion of the court. An application for a *mandamus* is an application to the discretion of the court, who are bound to grant, or refuse it, according to the exigency and justice of the case.

The court below set aside upon terms, a regular judgment by default upon a *bail-bond*. It appears by the affidavits, upon which the rule of the court below setting aside the judgment was obtained, that the judgment was set aside on the ground of surprise; and the affidavits conclusively establish that fact, as respects the bail. There are peculiar and strong circumstances arising out of this case, to induce this court to look with a favorable eye upon the exercise of the power below. It was a case of *bail*, who are always tenderly regarded by the courts, and it was in a *bail-bond suit*, in which the court

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had an equitable jurisdiction given them by statute; for in such suits they are authorized to give such relief to the bail, as is agreeable to justice, and every rule giving relief, is to have the nature and effect of a *defeasance* to the bond. With respect to the facts disclosed to the court below, I cannot divest my mind of the impression, after a careful examination of the affidavits on both sides, that there is color to *infer that the bail, and the defendant in the original action, were intentionally lulled to sleep by the plaintiff, until a judgment by default was obtained. Another feature in the case is, that the application below for relief was made at the first opportunity, after the discovery of the judgment; and I cannot but think that this court would have exercised a similar power, in granting relief under the like circumstances.

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It is, however, contended, that the Court of Common Pleas had no power to set aside a regular judgment by default. It would be cause of regret, if no such power existed; for without it there would often be a manifest failure of justice. But, independent of the equitable jurisdiction, given in these suits upon *bail-bonds*, the courts of common pleas have such power. They cannot, in general, set aside a verdict, except for irregularity; but that restriction does not apply to judgments by default. In the case of *Bayly v. Boorne*, (*Str.* 392.) the Court of *K. B.* said, that whether an inferior court should be allowed to exercise their discretion, in setting aside judgments, where the plaintiff was regular, was a question which deserved consideration; but they expressly admitted, that the court might set aside the judgment, if there was evidence of fraud or surprise. Lord *Mansfield*, afterwards, (*1 Burr.* 571.) in speaking of the words used by the court in that case, viz. "that it was a question that deserved consideration," said, that there was no precedent, or authority, to the contrary of their having such a power; and that it was a power necessary to the exercise of judicature, and very different from the case of setting aside verdicts; and the court then unanimously declared, that an inferior court had power to set aside a regular interlocutory judgment, in order to let in the merits. The case then before the court was a case of an interlocutory judgment, but there is no distinction taken, nor any ground for a distinction, between a judgment by default, in a case sounding in damages, and a judgment by default in an action of debt. The only restriction imposed upon the inferior courts, on this subject, respects the verdicts of juries.

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*We are, accordingly, of opinion, that the court below had power to set aside the judgment in question, and that, under the particular circumstances of the case, that power was not unduly exercised. The motion for a *mandamus* is, therefore denied.

Motion denied

JACKSON, *ex dem.* GOODRICH and others, *against*
A. OGDEN and J. OGDEN.

A lessor of the plaintiff in ejectment cannot be a witness in the cause; if his name is used without his consent, it may be struck out, on application to the court. Evidence of the acts of the lessor of the plaintiff, in ejectment, which tend to conclude him, and those who derive title under him, is admissible.

THIS was an action of *ejectment* for land, in the town of *Walton*, in the county of *Delaware*. The cause was tried at the *Delaware* circuit, on the 24th *May*, 1808, before Mr. Justice *Yates*. The declaration contained eleven demises. A title was deduced to some of the lessors of the plaintiff to lots No. 15 and 16. in a tract of land originally surveyed for *Peter Van Brugh Livingston*, and others, lying between the west branch of the *Delaware*, and the *Susquehannah* river; and the only question at the trial was how the lots were to be located.

The plaintiff produced in evidence a warrant of survey, dated the 8th *October*, 1785, describing the outlines of the tract, and a *return* of the surveyor-general, dated the 29th *April*, 1786, of a survey of the outlines of the tract, ascertaining the quantity to be 35,178 acres, with a map of the lots; and an order from the commissioners of the land-office for a patent to the proprietors, of which *Wattles*, one of the lessors, was one, and a map of partition. He also produced a patent to the trustees of *Adams*, who are also lessors, for No. 15. and a patent to *Wattles* for lot No. 16.

Jacob Trumbourn, a surveyor, testified, that he had traced and chained the south-west lines of the tier of lots, from No. 1. to the *Delaware*; that tracing the lots from No. 1. to a hemlock tree, blazed on four sides, and then locating *No. 16. on the *Delaware*, according to the distance in the patents, there would be a vacancy of about 78 chains.

Arch. E. Payne, surveyor, testified, that lot No. 16. accord-

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ing to the description in the patent, contained 101 acres, but by his survey, and as *Griswold* possessed it, it contained 128 acres.

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The defendant offered *S. Wattles*, one of the lessors, as a witness, to prove that he surveyed the tract by order of government, and that he made 17 tiers of lots, instead of 16; that he made the map with but 16 tiers of lots, leaving a vacancy between 15 and 16; but he was objected to. He was offered to be sworn on his *voir dire*, that he had no interest in the land, and would disclaim all connection in the suit, but he was rejected by the judge.

James A. Murrin, a surveyor, proved, that he traced all the lines of lots 15 and 16. as possessed and located under the patents, and he had no doubt there was a vacant lot between them. The defendants were proved to have been in possession of the premises eight or nine years, and *M Call*, under whom they claim, fourteen or fifteen years.

By articles of agreement between the defendants and *Griswold*, one of the lessors, dated the 5th *July*, 1797, the defendants covenanted to convey to *Griswold* 50 acres, lying next to lot No. 16. then, and now, in the possession of *Griswold*; and a witness was called to prove that he assisted *Griswold* in laying out the 50 acres, and that *Griswold*, who held lot No. 16. considered it, until lately, as no larger than his possession, according to the distances in the patent. The plaintiff admitted he was in possession of lot No. 16. under a deed from one *Freeman*; and he objected to the evidence of the acts of *Griswold*. The counsel for the defendants insisted, that the plaintiff having recognized the interest of *Griswold*, by making him a lessor, and he being shown to be in possession under title, all the mesne conveyances from *Wattles* to him were to be presumed. But the judge rejected his evidence, and, under his charge, the jury found a verdict for the plaintiff.

A motion was made, on the part of the defendants, to set aside the verdict;

*1. Because *S. Wattles* ought to have been admitted as a witness;

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2. Because the evidence of the acts of *Griswold* ought to have been received; and,

3. Because the verdict was against evidence.

The case was argued by *Hawkins* and *Ruggles*, for the defendant, and *E. Williams*, for the plaintiff.

SPENCER, J., delivered the opinion of the court. The essors of the plaintiff having, on the trial, deduced a title, in some of them, to lots No. 15 and 16. in a tract of land originally surveyed for *Peter Van Brugh Livingston*, and others,

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lying between the *Coquaga* branch of the *Delaware* river and the *Susquehannah* river, in the town of *Walton*, in the county of *Delaware*, it became the sole question on the trial, how these two lots should be located. On the map of partition between the original purchasers, made prior to the issuing of the patents, it appears that lots No. 15 and 16. adjoin each other, and the patent for lot No. 15. refers to the map on file in the secretary's office. It is required to begin at a beech tree, marked 14 and 15. running thence south twenty-eight degrees east, 70 chains and 81 links, to a hemlock tree, marked No. 15 and 16. running thence north 62 degrees east, 34 chains and 32 links, to a beech sapling, marked No. 15, 16. 31, 32. then north twenty-eight degrees west, 70 chains and 81 links, to a maple tree, marked 14, 15. 30, 31. and then in a direct line to the place of beginning, containing 243 acres. The patent for No. 16. describes the boundaries as follows: beginning at a hemlock tree, marked No. 15 and 16. and running thence south 28 degrees east, 29 chains to the *Delaware* river; then up along the same 34 chains and 32 links, measured on a course north, 63 degrees east to a beech sapling, marked No. 16. thence north 28 degrees east, 30 chains, to a beech sapling, marked No. 15, 16. 31, 32. and thence on a direct line to the place of beginning, containing 157 acres. From the map, and the description of the lots in the patent, the lessors of the plaintiff have made out a title to the premises *in question. It is, however, not to be controverted, that parties, whose rights to real property may be perfect, and the boundaries of which may be susceptible of certain and precise ascertainment, may, by their acts, conclude themselves, by establishing other and different boundaries. *Thomas W. Griswold*, one of the lessors of the plaintiff, and who must be considered, in 1797, as proprietor of lot No. 16, purchased of the defendants 50 acres of the land which they set up to be vacant, and to lie without both lots, 15 and 16, which was described in the instrument he took, as without the bounds of that lot. The evidence of this purchase, though under seal, was excluded by the judge at the trial; what other evidence might have been adduced, we cannot pretend to say; it might have been followed up by acts which would conclude *Griswold*, and those who derive title under him, from claiming the premises as within either of the lots, and after the rejection of the covenant entered into between *Griswold* and the defendants, the defendants might well have forborne to offer similar or inferior evidence of acts. In this view, that it was improper to exclude such evidence, and that it should have

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been submitted to the jury, with such observations as the evidence required, I think there should be a new trial. The rejection of one of the lessors as a witness, I conceive to have been proper; if his name was used without his consent, it might be struck out, on application to the court. (a) The costs must abide the event of the suit.

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New trial granted.

(a) Notwithstanding what is said in the above case, it was decided in *Miller v. Starks*, 13 Johns. Rep. 517, that if the plaintiff in the suit be sworn and examined at the request of the defendant, the latter cannot afterwards object to his testimony, and get rid of the effect of it. Where two partners are sued, and the process is served upon one of them only, the defendant not served is a competent witness for the plaintiff. *Purviance v. Dryden*, 3 Serg. & Rawls, 402. But the plaintiff in such a case cannot compel a defendant not served, or appearing to testify on his behalf. *Taylor v. Henderson*, 17 Serg. & Rawls, 453. See also *Norman v. Norman*, 2 Yeates, 154. *Le Roy v. Johnson*, 2 Peters' Sup. C. Rep. 186. *Gardiner v. Olden*, 2 Yeates, 186. *Waggoner v. Gray's Adm.* 2 Hen. & Manf. 603.

*WELDON and FURNISS against BUCK and BUCK.

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THIS was an action of *assumpsit*, brought by the plaintiffs, who reside in *Great Britain*, on a bill of exchange drawn by *Robinson*, of *St. Kitt's*, in the *West Indies*, in favor of *Freeman*, on *Worswick* and *Allman*, of *Lancaster*, in *England*, for 260*l.* sterling, payable in 90 days after sight. The bill was endorsed by *Freeman* and by the defendants. The bill was protested for non-acceptance, on the 23d *May*, 1806; but no demand of payment, or protest for non-payment, was made, until four days after the days of grace had expired. Due notice of the non-acceptance was given to the defendants, on the 2d *August*, 1806, and the protest stated the refusal to accept, to be for want of funds. The declaration was on the protest for non-acceptance only.

The bill was purchased here by an agent of the plaintiffs, for the purpose of remitting money, in his hands, to them. The plaintiffs, on the protest of the bill, returned it to the agent in *New-York*, but not until after the time for its payment had expired, nor was any suit brought until after the bill was returned. The plaintiffs had authorized their agent to remit to them in bills.

Where a foreign bill of exchange is protested for non-acceptance, the holder, on giving due notice thereof, may commence an action against the drawer or endorser, on the protest for non-acceptance, without waiting for a protest for non-payment, and may recover, (a) besides the amount of the bill, 20 per cent. damages, with the usual interest and charges of protest.

(a) *Macon v. Franklin*, 3 Johns. Rep. 202. *Miller v. Hackley*, 5 Johns. Rep. 375. 20 Johns. Rep. 150.

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The cause was tried at the *New-York* sittings, the 8th June, 1808, before Mr. Justice *Van Ness*, when the jury found a verdict for the plaintiffs for 1,594 dollars, which included the amount of the bill, 20 *per cent.* damages, the charges of protest, and interest.

A motion was made to set aside the verdict; and two questions were raised for the consideration of the court.

1. Whether the plaintiffs were entitled to recover; and if so,
2. Whether they were entitled to the 20 *per cent.* damages, and the expenses of protests.

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Hawes, for the defendants. 1. The protest for non-acceptance alone, is not sufficient to enable the plaintiff *to recover the amount of the bill, unless he has used due diligence to present it for payment, at the time it was made payable. This is a part of his undertaking, and he ought to retain the bill in order to present it for payment. (*Chitty*, 180, 181.) It is true, that on a protest for non-acceptance, the holder has a qualified right of action, liable, however, to be defeated by a subsequent payment, or neglect of the holder. I am aware of the decision in *Mason & Smedes v. Franklin*, (3 *Johns. Rep.* 202.) but that case went no further than that the holder had a right of action against the drawer, on a protest for non-acceptance. If the law requires the holder to retain the bill, after a protest for non-acceptance, it must be for the purpose of presenting it for payment; but this would be useless, if the holder's right of action was absolute and perfect, on a protest for non-acceptance only. And the retaining of the bill may be very injurious to the endorsers. If the holder meant to rely on the protest for non-acceptance, he ought not to have retained the bill for 90 days; and by doing so, and not presenting it, until four days after the expiration of the days of grace, he has made it his own. If the holder of a bill neglects to demand payment when it is due, he makes it his own. (*Lovell*, 80, 81.)

2. The bill was remitted in payment of a debt, and the holder is not, therefore, entitled to damages. Damages are only recoverable on a protest for *non-payment*.

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Colden, contra. 1. The first question was settled in the case of *Mason & Smedes v. Franklin*. It was decided, that the holder had a good cause of action on the protest for non-acceptance, which could not be defeated by any subsequent irregularity or neglect, in the demand of payment, or in the protest for non-payment. The notice of non-acceptance is always sufficient to guard the drawer against surprise, and to enable him to draw his funds out of the *hands of the drawee. If he has no funds, no notice or protest is necessary.

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2. It has been always understood, that when a party is entitled to recover the principal, he is entitled to interest and damages. Wherever a party is entitled to re-exchange, he is entitled to damages; for the latter is only another name for re-exchange, which is the price paid by the holder of a protested bill for the money he receives for a bill redrawn on the party from whom he received the first bill, or on some other person. (*Chitty*, 298. *Pothier, de Change*, ch. 4. § 2. n. 64, 65, 66, 67. *Evans's Essays*, 57, 58.) This premium or expense will, of course, vary with the rate of exchange between the two countries; (2 *Hen. Black.* 678.) but to avoid all questions about the re-exchange, the rule of damages has been arbitrarily fixed, in all cases, at 20 per cent. (See *ante*, p. 119.)

Hoffman, in reply. 1. This is a suit against an endorser, and he ought not to be affected by a protest, for want of effects. The cases which have been cited were against the drawer. A protest for non-acceptance gives a right of action defeasible by subsequent events. Thus the capture, or loss, of a vessel, gives a right of abandonment; but if before the right is asserted, the vessel should be recovered and in safety, the right will be defeated. Suppose the bill had been actually paid in *England*, before the right of action on the protest for non-acceptance had been asserted, would not the action be defeated by such payment? The opinion of the chief justice, in *Mason & Smedes v. Franklin*, may be regarded as an *obiter dictum*, as that was not the precise point before the court.

2. If, as has been contended, the 20 per cent. damages are allowed for the re-exchange, then they can be recovered only on a protest for non-payment, for until then the holder has no right to redraw. The act of *Pennsylvania*, from which the rule as to the 20 per cent. damages is derived, directs the damages to be paid on a protest for non-payment. As the plaintiff grounds his right to a recovery on the protest for non-acceptance only, he must be content with the principal and interest, and cannot claim the damages.

*VAN NESS, J., delivered the opinion of the court. The plaintiffs' right to recover is denied, on the ground that they were bound to present the bill for payment, and to have the same presented for non-payment, notwithstanding it had previously been protested for non-acceptance. There are some *dicta* to give color to this objection, but they are neither supported by adjudged cases, nor well founded in principle. A notion once obtained in *England*, that in certain cases the holder, by having the bill protested for non-acceptance, could oblige the drawer or endorser to give security for the payment of it when it fell due; (*Cunningham on Bills*, 42. *Marius*, 117.)

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and protests for non-acceptance in *France*, even now, are nothing more than protests for security. This is probably the origin of the doctrine urged by the counsel for the defendant on this occasion.

When the nature of the undertaking of the drawer, and of those who subsequently give currency to a bill, is considered, it will be difficult to discover any good reason why the holder should be compelled to demand payment after acceptance has been refused. The obligation of the drawer and endorser is not only for the payment, but the due acceptance of a bill. The inconvenience and disappointment to the holder generally are the same, whether they arise from the one or the other. Upon the non-acceptance of a bill, the holder is bound, in most cases, to give immediate notice to the drawer, so that he may withdraw his property out of the hands of the drawee.

Suppose, then, that the drawer, in consequence of this notice, as it is to be presumed he will do, actually withdraws his funds from the hands of the drawee before the bill falls due, (and such a case may easily occur,) would it not be absurd to require the holder to present the bill for payment, when there is almost a certainty that payment will be refused?

It is admitted by the counsel for the defendant, that the holder has a right to commence a suit upon the protest for non-acceptance; but it is insisted, that if he omits to present the bill for payment, such omission would be a good defence against a recovery. Suits upon the protest for non-acceptance only, in *England*, are very common, and such a defence has never, that I know of, been attempted. Suppose a bill, payable at a very long sight, and that a suit should be brought on the protest for non-acceptance against the drawer or endorser, and the money collected before the bill becomes payable, it will not be pretended that the money could be recovered back, if the holder had neglected to present the bill for payment.

It was said, that the bill may be paid, notwithstanding acceptance may be refused, and that by permitting the holder to recover against the drawer, before the bill has been presented for payment, he may obtain the money from both drawer and drawee. Admitting this to be so, it does not prove the right of action against the drawer to be merely inchoate. But the answer to this argument is, that the drawer might avail himself of the payment made by the drawee in his defence.

This question, however, was put at rest by a recent decision of this court, after full consideration, in the case of *Mason & Smedes v. Franklin*. (3 *Johns. Rep.* 204.)

In that case, as in this, it was contended, that the right of action on the protest for non-acceptance, was merely inchoate, 130

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and became perfect only after protest for non-payment. The court held, "that a good cause of action arose upon the protest for non-acceptance, and even if it were admitted that the subsequent demand of payment and protest for non-payment, were void acts, they would not destroy the right to recover which had previously vested." This decision is fully supported by authority, and will hereafter be regarded, I trust, as the settled law. The qualification of this right, now set up, I do not find to have ever been before suggested. In *Bright v. Purrier*, (*Bul. N. Prius*, 269.) the defendant offered to prove, that by the custom of merchants he was not liable at all, till the bill fell due; but Lord Mansfield overruled the evidence. In *Chilton v. Whiffen & Cromwell*, (3 *Wil.* 17.) Chief Justice *Wilmot* gives a corrected report of the case of *Macarthy v. Barrow*, in 2 *Str.* 949. In that case, the court said, "that the non-acceptance or protest did not raise any debt. That the drawer, instantly upon his drawing the bill, contracts a debt, and that a protest is nothing but a notice that the drawer will not pay it; that it is *debitum in presenti, solvendum in futuro*. And the obligation to pay arises as well upon the protest for non-acceptance, as for non-payment." To the same effect is the case of *Milford v. Mayor*, (*Doug.* 54.) and the more recent case of *Ballingalls and another v. Gloster*. (3 *East*, 481.)

The plaintiffs' right to recover being, as I think, perfectly clear, the next question is, whether they are entitled to recover the 20 per cent. damages. This point has already, in a great measure, been disposed of; for if the plaintiffs' right of action was complete and perfect, when they commenced this suit, this bill having been remitted in the usual course of business, it appears to me to follow, as a necessary consequence, that they are entitled to recover the damages. The law allowing damages to the holder of a dishonored bill, was dictated by reasons of commercial policy, which apply with equal force to the case of a bill protested for non-acceptance, as to that of a protest for non-payment. The amount of the damages, in other countries, depends upon the rate of exchange. This was so uncertain and fluctuating, that in this state, by the custom of merchants, another rule was introduced, the object of which was to reduce the amount of damages upon returned bills, to a sum certain. It was said, that the right to demand damages arises only upon the protest for non-payment, and that there is no case in which they have been allowed, when the suit was founded upon the protest for non-acceptance only. I have not met with any express adjudication upon this point, but if any distinction of this kind existed, it is hardly possible that it would not have been recognized in some of the cases which have been mentioned. I, however, find no such distinction, nor can I conceive of any good reason to be assigned for its

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adoption. (2 *Hen. Bl. Rep.* 378. *Mellish and another v. Simeon.*)

The opinion of the court, therefore, is, that the plaintiff is entitled to recover the amount of the bill, the 20 *per cent.* damages, with the usual interest, and also the expenses of the protest for non-acceptance; and judgment must be entered accordingly.

Judgment for the plaintiff.

HYATT against WOOD.

If a person having a possessory title to land, enters by force, and turns out a person who has a naked possession only, the latter cannot maintain trespass against the person so entering, under color of title. If a person having a legal right of entry on land, enters by force, though he may be indicted for a breach of the peace, yet he is not liable to a private action

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of trespass for damages, at the suit of the person who has no right, and is turned out of possession.

Where a tenant holds over the term, and the landlord enters by force, and turns him out, he cannot maintain trespass against the landlord. (a) If the defendant, in an action of trespass *quare clausum fregit*, pleads *liberum tenementum*, the plaintiff cannot reply *de injuria sua propria*, but must traverse the title: but if the defence be set up by way of excuse, and not in justification, then the plaintiff may reply *de injuria sua propria*. (b)

(a) See *Rumyan v. Mercereau*, 11 *Johns. Rep.* 535. *Everton v. Sutton*, 5 *Wend. Rep.* 255. *Erwin v. Oksted*, 7 *Cow. Rep.* 229. 16 *Johns. Rep.* 200. *Ives v. Ives*, 13 *Johns. Rep.* 235.

(b) *Grinwood v. Sedgwick*, 1 *Wend. Rep.* 126.

was mowing, and struck him with a stick. The defendant, at the same time said, that the plaintiff had possession of the lot, and that he meant to dispossess him, and that, if he could not do it by fair means, he would by his stick. The defendant claimed the meadow, and there were cattle at pasture on the lot. The plaintiff executed a lease to *Murray & Mumford*, for 450 acres, in *Junius*, for one year, from the 30th March, 1805. He was the only person who actually lived on the lot.

The defendant produced a deed from *Green* to him for all the right and title of *Green* to the premises in question. The deed was objected to by the plaintiff, but was admitted in evidence. It was proved, that when the deed was executed, *Green* requested permission to continue in possession until the 1st March, 1805, to which the defendant consented. On the 1st March, 1805, the defendant not being present, *Green* and his family went out of the house, and immediately returned again, and requested a person present to take notice that he gave up the possession. When this took place, *Green* removed nothing from the house, but stood at the door and said, that he delivered up the possession to the defendant; and the plaintiff was then in the house. On the 7th November, 1804, *Green* gave a writing under his hand and seal to the defendant, acknowledging himself to be in possession of the improvements of lot No. 80. in *Junius*, which he had sold to the defendant, and promising to deliver up the peaceable and quiet possession of the same, to the defendant, his heirs and assigns, on the 1st of March following. This instrument was not, in fact, executed, until two or three weeks after its date, and when it was delivered, the defendant paid *Green* 700 dollars. A witness also testified, that the plaintiff told him, that he believed that *Green* had given up the possession honestly to the defendant, and that the plaintiff knew, when he came there, that the defendant had bought the property of *Green*, and that he was put into possession by *Mumford*, and that he did not consent to the defendant's taking possession; that *the plaintiff also said, that he was present when the defendant bought the farm of *Green* for 850 dollars, and that he knew the place belonged to the defendant, but that he meant to be faithful to those who put him in.

The judge said, that unless the plaintiff consented to a nonsuit, he should charge the jury, that the evidence produced by the defendant was sufficient to support the plea of *liberum tenementum*, and that the same might be given in evidence under the general issue. He then called the plaintiff, who submitted to a nonsuit, with leave to move for a new trial.

Hopkins, for the plaintiff. I agree that *liberum tenementum* may be given in evidence under the general issue; but I con-

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tend that there was no evidence of a freehold. The deed from *Green* to the defendant was a mere transfer of the possession, or improvements. There is no evidence that *Green* had, or pretended to have, the right of property. It was the mere claim of an intruder on land, for the improvements he had made while in possession; and the defendant's title consists only in a release to him of all *Green's* right and title to these "improvements." No interest or property in the soil was transferred; nor is there any covenant or warranty as to a title. It is well known to be a practice in some parts of the state, though not warranted by law, to bargain and sell these pretended claims by intruders for their improvements. The defendant had not the possession, or the right of possession; he was the mere purchaser of a claim which the law does not recognize. He had no right of entry, but was a mere intruder on the plaintiff, who was in the peaceable possession of the land, and exercising various acts of ownership. If the defendant had pleaded *liberum tenementum*, and that plea had been traversed, he would have been obliged to make out his freehold.

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But, admitting that the defendant had a right of entry, this could only justify a peaceable and formal entry on the land, for the purpose of vindicating his rights, and not a violent and forcible entry. (3 *Black. Com.* 4, 5, 174.) Private rights can never be asserted by force, as it may endanger the public peace. So, for the purpose of a continual claim, a person may make a formal and public entry on the land which he claims, in a peaceable manner; after which he must resort to his legal remedy. If such an entry be made by force, the party against whom the force is used may have his action for damages. (*Litt. s.* 431. But see note 1. [*Co. Litt.* 257.] by *Butler*.) The statute against forcible entries and detainers was made for preventing such a violent proceeding. If a party might forcibly enter and turn out a person who is in possession, there would be no occasion for the action of ejectment. The party turned out of possession would have no remedy against him who has the title, and who has asserted it by force. There is a radical distinction between a formal entry, in order to lay the foundation for an action at law, and a forcible entry and expulsion. A *trespass* by a lessor will not suspend the rent, though an eviction or *expulsion* of the lessee may be pleaded to an action for the rent. (1 *Saund.* 204. note 2. *Bull. N. P.* 165—177. *Couv.* 243.)

Again, *possession* is sufficient to maintain an action of trespass. The plaintiff had a right of action against the defendant for coming on the land; yet this is inconsistent with the idea, that the defendant can have a good defence, for the same cause. The plaintiff, being in possession and claiming title,

may justify an assault and battery, in defence of his possession. (*Cro. Car.* 138. *Shevill v. Avery*.) The title is *inducement* only to the defence, and is not material; and an *inducement* is not traversable. (1 *Ld. Raym.* 134. 3 *Term Rep.* 643.) If possession, then, will justify an assault and battery in defence of it, it follows, that the defendant cannot justify his entry or trespass: for it is absurd to say, that the attack and defence are both justifiable.

Can any one enter and expel another, except the person who could have maintained trespass? A disseisee cannot maintain trespass, except for the actual disseisin, until after a re-entry. (*Bull. N. P.* 87. 11 *Co.* 51. 56. 3 *Bl. Com.* 209, 210.) The defendant may plead *liberum tenementum* in justification of a formal and peaceable entry; but not where there is *force*. Every trespass is stated to be *vi et armis*; but the defendant may justify as to the entry, that it was peaceable, and traverse any other *force* alleged.

*The plaintiff ought not to have been nonsuited, for it was a fact for the jury to decide, whether there was more force used, than was necessary to make a formal entry on the land.

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T. A. Emmet and Riker, contra. It is admitted, that a freehold may be given in evidence under the general issue, but it is objected, that the defendant has not shown a freehold. The defendant was in, under *Green's* title; and *Green* was proved to have been in possession from 1795, claiming the land as his own. Possession is *prima facie* evidence of a fee; (2 *Bl. Com.* 290.) and all persons in possession are, *prima facie*, capable of conveying. The deed is to the defendant, his heirs and assigns; this, accompanied by possession, is presumptive evidence of a fee, unless a minor title is shown.

The possession of the plaintiff was not an *adverse* possession, (*Runnington*, 60, 61. *Buller, N. P.* 104.) for he obtained it by permission of *Green*. As the plaintiff came into possession with the consent of *Green*, who was the tenant of the defendant, he can be considered in no other light than as a tenant at sufferance. If the plaintiff was a tenant at sufferance, the defendant had a right to enter upon him. (*Wilde v. Cantillon*, 1 *Johns. Cases*, 123.)

A person who has a title or right of entry on land may enter with force, provided it is not made with that degree of force which would amount to an indictable offence. A person cannot be indicted for a bare trespass, though stated to be *vi et armis*. Indictments under the statute against forcible entries and detainers, have been frequently quashed, where there was no evil or malicious intent, and the force used was moderate. (3 *Burr.* 1698. 1706, 1707, 1731. 1 *Caines*, 125. 2 *Caines*, 98.)

Blackstone compares the right of entry on land, by the real

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owner, to the right of recaption of personal property. A person may retake his own property *by force*; and though he may be liable for a breach of the peace, yet no action of trespass lies; and if the person who enters by force, has a good title, no action of trespass will lie. Not a precedent can be found for an action of trespass in such *a case. To maintain trespass, there must be not only a possession, but a *lawful* possession. (6 *Bac. Abr.* 566, 567. *Trespass*, (c) 3. 2 *Hawk.* 29. c. 64. s. 1, 2, 3. *Dalt. Sheriff.* c. 129.) A lessee at will cannot maintain this action against one who enters under color of title. At common law, before the statute of 5 *Richard II.* a party disseised might recover his possession by *force*; and the statute of 15 *Richard II.* relative to forcible entries, from which our statute is taken, requires a particular mode of proceeding. (*Co. Litt.* 257. a. note 1. by *Butler.*) If the party who has the right, gains possession by force, still he will hold the possession, unless the party dispossessed proceeds under the statute, and obtains a restitution; and unless the party proceeds within three years, he cannot have the benefit of a restitution. And since the statute, in an action of forcible entry, if the defendant shows a title which is found for him, all inquiry as to the *force* is dismissed. (2 *Hawk.* c. 64. s. 3.)

Wherever a title is pleaded, there is an end to the question about possession, and the issue is on the mere title. A freehold may be given in evidence under the general issue; and every thing, on the contrary, may be given, in evidence, which might be replied to that plea. Then, what can be replied to a plea of freehold? There are three ways of replying to such a plea: 1. A general traverse. 2. If the plaintiff derives title under the defendant's freehold, he must admit the freehold pleaded, but insist on a lease, or some title under the defendant, who must then traverse the replication; or, 3. Without either confessing or denying the plea, the plaintiff may reply a title derived from a third person, and inconsistent with that of the defendant. (*Willes's Rep.* 225. *Lambert v. Stroother.*) On a traverse of the plea of freehold, no question, but that of title, can be discussed; a possession cannot be given in evidence, or pleaded. (*Cro. Car.* 123. *Strange*, 1238.) Here no title was replied, but a bare possession. The judge was, therefore, right in directing a nonsuit.

Hopkins, in reply, observed, that though a tenant at sufferance might be turned out by the landlord, or owner, yet a person in possession, and claiming title, could not be turned out by force; for, if this could be done in the case *of a possession for five years, it might, also, be done where there was a possession for 20 years. Such a doctrine would be very inconvenient and injurious in practice. But, allowing a *formal and*

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peaceable entry, in order to found an ejectment to try the right, removes all difficulties. He cited 9 *Wentw. Pleadings*, 49, &c. 102. 118. 123. 133. 251. 266. 324. 326. for forms of pleadings in similar cases. Though *de injuria sua propria* cannot be replied as to the title, yet it may be replied as to the force and other wrongs. (*Lawes*, 154. 157.)

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SPENCER, J., delivered the opinion of the court. It is essential to consider, in the first place, the rights of the parties in the premises. The plaintiff entered under *Murray & Mumford*, and also by the permission of *Green*, and whilst he was in possession. *Murray & Mumford* appear to have no title to the lot, for none is shown. *Green* is the only person who appears to have had any interest in it, and that is a possession for nearly ten years. As against all but the rightful owner, *Green's* possessory interest must prevail. By the deed of the 7th of *November*, 1804, the defendant became clothed with all *Green's* right, of whatsoever kind it might be; and, by the instrument of that date, *Green* acknowledged that he held the improvements sold to the defendant, and promised to yield up possession to the defendant on the 1st of *March* after. Thus *Green* virtually became the tenant of the defendant, until the first of *March*, and, after that day, he became a tenant at sufferance. (2 *Bl. Com.* 150.) Tenancy at sufferance is defined by *Blackstone* to exist, where one comes into possession of land, by lawful title, but keeps it afterwards, without any title at all. In the present case, the continuance of *Green* in possession, after his sale to the defendant, under an agreement to yield it up on a precise day, brings him within the spirit of this definition; and his remaining in, after the 1st of *March*, was without any title, and, consequently, he must, from that period, be regarded as in by the sufferance of the defendant. It is a most salutary principle, that a person holding the possession of lands for another, cannot, by his fraudulent acts in derogation of the rights of *the landlord, change or control those rights. It is evident in this case, that the plaintiff did acquire his possession by the connivance of *Green*, and with a view, on the part of both, to defeat the defendant's possessory title, acquired at an anterior period, for a valuable consideration, and *bona fide*. It is also apparent to me, that the plaintiff's title, under *Murray & Mumford*, is merely colorable, and that he, in fact, gained nothing from them; and that the plaintiff must be considered as having acquired his possession under *Green*. Consequently, he stands precisely in his place, and must be regarded as a tenant at sufferance, since he entered before the 1st of *March*, by *Green's* permission, and continued in after *Green's* right to the possession was at an end. If this view of the subject be correct, as it appears to me to be, then the case of *Wildes v. Cantillon*

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(1 *Johns. Cases*, 123.) is in point. It was, in that case, determined by this court, that a tenant at sufferance could not maintain trespass against his landlord; for, as against him, he has no legal right of possession on which to found the action. If, however, the plaintiff is not to be regarded as a tenant at sufferance, still I think the nonsuit was correct. Trespass is a possessory action, founded merely on the possession, and it is not at all necessary that the right should come in question. (*Willes's Rep.* 221.) If, therefore, the defendant can show himself entitled to the land itself, or to the possession, he cannot be rendered responsible to a person having neither a right to the land, nor to the possession. In this case it cannot be pretended, that the plaintiff has any right or interest in the land, or the possession. He has certainly nothing more than a naked possession; whereas the defendant is clothed with *Green's* title, which is a possessory title of at least nearly ten years' standing. It may be laid down as an axiom, that no man can recover upon a claim of right to property against another, whose rights to the subject matter are superior to those of the person so claiming damages for a violation of his supposed rights. At common law, and prior to the statutes to prevent forcible entries, wherever a right of entry existed, the disseisee might lawfully regain the possession*by force. (2 *Hawk.* c. 64.) In a case, bearing analogy to the present, of personal property, the right of recaption exists, with the caution that it be not exercised riotously, or by a breach of the peace; for should these accompany the act, the party would then be answerable criminally; but the riot or force would not confer a right on a person who had none, nor would they subject the owner of the chattel to a restoration of it to one who was not the owner. With respect to real property, the owner, having a right of entry, may, since the statutes, enter peaceably upon one who is in possession without right, by the very terms of those statutes. (3 *Term Rep.* 292. 3 *Bl. Com.* 174.) If the entry in such case be with a strong hand, or a multitude of people, it is an offence, for which the party entering must answer criminally; but it would be an absurdity to say, that he must also be responsible in damages, as for an injury to the person who has no right, but is himself a wrong-doer, in consequence of his illegal entry. In the case of *MDougal v. Sticher* and another, (1 *Johns. Rep.* 44.) the entry was considered peaceable, and therefore justifiable on the part of the owner; but Mr. Justice *Livingston*, in delivering the opinion of the court, very justly observed, that, if the entry had been by breach of the peace, the defendants might, perhaps, have been indicted, but this would not have rendered the defendants trespassers against a party who had no longer any interest in the *locus in quo*. In the case of *Taunton v. Costar*, 138

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(7 Term Rep. 431.) the defendant, who was a tenant from year to year, held over, after proper notice to quit, and the landlord entered upon him, Lord *Kenyon* observed, that the case was too plain for argument. "If, indeed," said his lordship, "the landlord had entered with a strong hand to dispossess the tenant by force, he might have been indicted for a forcible entry; but there can be no doubt of his right to enter upon the land at the expiration of the term." The same principle is recognized by *Runnington and Dalton*. (*Runnington*, 60, 61. *Dalt.* c. 129.) I am warranted, therefore, in concluding, that, though the statutes of forcible entry and detainer have so far altered the common law, as to render persons having a right of entry, indictable as for breach of the peace, in entering forcibly; *yet, as respects the civil remedy, it remains as it was before the passing of the statutes; and, consequently, where the party entering has a right to the possession, he cannot be made answerable in damages to a party who has no right, and is himself a *tort-feasor*. If other considerations were necessary to illustrate the correctness of this position, they would be found by a reference to the pleadings in actions of trespass. It cannot, I think, be controverted, that if, in an action of trespass *quare clausum fregit*, the defendant shall plead *liberum tenementum*, (9 *Went.* 99. 101. 190. 124. 133. 185. 101.) the plaintiff must either traverse the title set up, or, by a replication admitting the source of the derivative title, state a title in himself paramount to that of the defendant; but in no case, where the defendant sets up a title, can the plaintiff reply *de injuria sua propria* alone. (*Laves*, 154.) If the defence set up be matter of excuse, as contradistinguished from matter of justification, then a replication *de injuria sua propria* puts the excuse in issue. (a)

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(a) *Plumb v. M'Crea*, 12 *Johns. Rep.* 491. *Strong v. Smith*, 3 *Caines's Rep.* 164. *Hannen v. Edes*, 15 *Mass. Rep.* 347. *Coffin v. Bassett*, 2 *Pick. Rep.* 359. *Noale v. Claustice*, 7 *Harr. & Johns.* 272. When the plea consists of, or comprises matter of title or interest in the land, or the commandment of another, or authority of law, or authority in fact, derived from the opposite party, or matter of record, in any of these cases, the replication *de injuria* is generally improper; and the traverse of any of these matters should be in the common form, that is, in the words of the allegation traversed. *Steph. on Pleading*, 204. (2d Am. edit.) To a plea of *liberum tenementum*, the plaintiff cannot reply *de injuria*, &c. *Hyatt v. Wood*, 4 *Johns. Rep.* 150. See 1 *Chitt. Plead.* 512. (5th Am. ed. 1833.) It has been decided in *New Hampshire*, that where the defendant, in an action for assault and battery, pleaded *son assault demene*, and the plaintiff replied *de injuria sua*, &c., upon which issue was joined, it was competent for the plaintiff to show, that the assault which the defendant made was excessive. *Curtis v. Carson*, 2 *New Hamp. Rep.* 530. The court, however, observed that, in such a case, a new assignment was a more technical and proper answer to a plea of *son assault demene* than a replication *de injuria*. See also *Hannen v. Edes*, 15 *Mass. Rep.* 347. Where the plea contains matter of record, not merely inducement, which is denied, the replication should not be *de injuria*, but *nul tiel record*. 1 *Chitt. Plead.* 528. See *Allen v. Crofut*, 7 *Conn.*

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If, in trespass, the plaintiff might admit the title, and go for the force, there would be found some precedent of such pleadings; and the want of such a precedent is a strong argument against the plaintiff's recovering, in the present case, for acts done by a person who has the best possessory title.

I have hitherto considered the defendant as having entered on the plaintiff's possession with force. The facts do not warrant the idea, that there was an assault and battery committed on the plaintiff, but this act surely would not naturally produce a dispossession. For aught I see, the entry was peaceable; but if it were otherwise, on principle, I think the defendant has done no wrong to the plaintiff's rights, for he had none. It has been strongly urged, that this doctrine tends to tumult and violence, which the law ought not to countenance; but sufficient restraints will be found in the remedy by indictment, and in the liberality with which jurors will give damages where a wrong-doer undertakes to enter without right. In one point of view, the doctrine is salutary, inasmuch as it will lessen the inducements, afforded by legal delays, to the unjust acquisition of the possession of real property. But with arguments *ab inconvenienti*, the court has no concern, if the law is, as I think it to be, so settled. It was supposed, that the decision of this court, in a case between the same parties, (3 Johns. Rep. 239.) had, in effect, decided the present question; but, by reference to that case, it will be seen, that the only point there was, whether it was proper to grant a new trial in an action for an assault and battery, where, at all events, the damages must be small. The court do say, in that case, that the principle stated by the judge was incorrect; but, admitting it to be so in that case, it is a *non sequitur*, that, in an action for a redress of a supposed injury to the property itself, it would also be incorrect. The judge there stated, that a party having the right of possession, had a right to enter on the party in possession, and use such force as was necessary to expel him.

Very different considerations are applicable to an action for an assault and battery, and an action of trespass *quare clausum fregit*. In an action for the personal injury, the defendant, who is not in possession, cannot justify an entry and the exercise of personal violence; but in an action for an injury to the

Rep. 46. *Green v. Overington*, 16 Johns. Rep. 55. There are also many cases, in which, though the replication *de injuria* might not be objectionable upon demurrer, still it would be improper to adopt it; and it may be necessary, in effect, to confess and avoid the plea, as in the case of assault first committed by the plaintiff, which he can justify; and in an action for false imprisonment, where the defendant justifies the commitment as a magistrate for a bailable offence, in consequence of an information upon oath, the plaintiff, under the general replication *de injuria sua propria*, cannot give evidence of a tender and refusal of bail, but ought to reply that matter specially. 1 Chitt. Plead. (5th Am. ed. 1828.) 2 W. Black. Rep. 1165.

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land itself, he may justify the force as respects the possession. In every point of view in which this case can be considered, I remain of the opinion, that the nonsuit was right; and such is the opinion of the court.

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Rule refused.

*JACKSON, *ex dem.* HARDENBERGH and others, *against* [* 161]
JACOBUS SCHOONMAKER.

THIS was an action of ejectment for land, in the town of Rochester, in the county of Ulster. The cause was tried at the last Ulster circuit, before Mr. Justice *Van Ness* and a special jury. Eight of the jurors had been on a view of the premises.

The certificate of the proof or acknowledgment of a deed, taken before a judge, is not conclusive; but the party affected by the deed, may contest its validity, and the force and effect of the formal proof. (a)

The plaintiff gave in evidence a patent to *Beekman* and others, dated 25th June, 1703, called the Rochester patent; and a deed from *Hend. Rosekrans*, *Jacob De Witt*, and *Jacobus Wynkoop*, trustees of the town of Rochester, to *Leonard Cole*, senior, dated the 18th November, 1714, which was proved, the 12th December, 1750, before a judge of the county, by the acknowledgment of one of the grantors, and by his oath that the other grantors, who were dead, had duly executed the deed, as trustees. This deed, by virtue of the certificate of the proof endorsed thereon by the judge, was recorded on the same day, in the county.

The defendant's counsel objected to the admission of the deed as evidence, because, as there was no evidence of a possession accompanying the deed, it could not be received as an ancient deed; and also offered to prove that *Jacob De Witt*, one of the grantors in the deed, at the time he made the acknowledgment certified on the deed, by virtue of which it was recorded, was *non compos mentis*; but the judge rejected the evidence, and admitted the deed to be read in evidence. The plaintiff also gave in evidence a deed from *Leonard Cole*, jun. the son and heir of *Leonard Cole*, sen. to *Jehosaphat Dubois*, dated 30th October, 1751; the will of *Jehosaphat Dubois*, dated the 4th September, 1757, devising his estate to his wife for life, with remainder to his three daughters. *J. Dubois* died the 12th

(a) *Jackson v. Perkins*, 2 Wend. Rep. 308.

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September, 1757, and his wife in 1792: one of the daughters died in the life-time of her mother, without issue. The other *daughters, who are lessors of the plaintiff, were married before the death of their father, and have so continued.

From the opinion delivered by the court, it is unnecessary to state the rest of the evidence in the case, or to detail the numerous facts which related to the *location* of the premises. On the motion to set aside the verdict, several points were raised by the counsel, and which, on the argument of the cause, were discussed at length; but it is requisite only to state the argument on the single point, as to the conclusiveness of the proof of the deed to *Leonard Cole, senior*.

E. Williams, Rudd, and L. Elmendorf, for the defendant. The proof of a deed before a judge, is *prima facie* evidence only. It would be extremely dangerous to allow these certificates of acknowledgment, or proof of deeds to be conclusive. It is well known that many certificates of the proof of deeds for lands in the military tract have been forged. The fact of the proof may be controverted, and the facts certified may also be contested. The identity of the grantor may be disputed, or his infancy may be shown. The judge who takes the proof acts as a ministerial officer, and *ex parte*. In case of a *fine*, or other conclusive acknowledgment, it is done in open court, and the taking of it is a *judicial* act, and matter of record.

J. Tallmadge and Sudam, contra. The judge is no more a ministerial officer, than a commissioner to take the acknowledgment of a *fine*. Being a judicial officer, his acts are to be considered as judicial. *Res judicata pro veritate accipitur*. All acts which the judge certifies as done by himself, must be considered as done, and being a matter of record by a judge, are to be deemed conclusive. Every judicial act must be intended to be rightly done. Where a *fine* is once acknowledged, either before a court, or commissioners, no averment will afterwards be received of any legal disability of the *cognisor*, as that he was an idiot, lunatic, or *non compos mentis*. (*Cruise's Dig.* tit. 35. ch. v. s. 33. See also s. 6, 7, 8. and tit. 36. ch. viii. s. 17, 18. 2 *Leo.* 159. *Keble*, 480. *Dyer*, 222. 4 *Co.* 124. 12 *Co.* 112. 124. 1 *Sid.* 321. 10 *Co.* 42. 10 *Co.* 106. *Hob.* 225.) It would be extremely inconvenient, after a deed has been recorded *above 50 years, that the certificate or act of the judge should be impeached, and the record be thereby invalidated.

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Per Curiam. The acknowledgment and proof of deeds is merely for the purpose of recording them, and is not conclusive on the opposite party. The proof or acknowledgment is, necessarily, *ex parte*; and the party who is to be affected by

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the deed, ought, at any time, to be allowed to question its validity, and the force and effect of the formal proof. To consider the certificate of the judge as conclusive on this subject, would produce manifest injustice. As there was a misdirection of the judge in refusing the evidence offered to rebut the proof of the deed to *Cole*, which was taken in 1750, we think there ought to be a new trial with costs, to abide the event of the suit. We give no opinion on the location of the deed, which has been so much contested.

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New trial granted.(a)

(a) S. C. 2 Johns. Rep. 230.

JACKSON, *ex dem.* WINTHROP, *against* INGRAHAM.

THIS was an action of ejectment for lands, in *Chazy*, in the county of *Clinton*. A verdict was taken for the plaintiff, subject to the opinion of the court, on a case which the counsel were several hours in reading, but the material facts contained in it, are as follows: At the trial, the plaintiff produced letters patent from the colonial government of the province of *New-York* to *Elkanah Dean*, dated the 11th July, 1769, for a tract of land, lying on the west side of *Lake Champlain*, in the then county of *Albany*, containing 13,500 acres; and also for an island in the lake called *Grand Isle*, containing 16,500 acres. Under this patent, which included the premises in question, the lessor of the plaintiff *derived his title. The premises in question are situated south of the river *St. Lawrence*, and of the 45th degree of north latitude. It was admitted that the lessor, in 1805, had sold lands within this patent, to several persons, who are in possession under such sales.

The defendant produced a grant from the French government in *Canada*, issued by *Charles Marquis de Beauharnois*, and *Giles Hocquart*, at *Quebec*, the 11th April, 1733, to *Sieur Megion de la Gauchetiere*, a captain of *marines*, for a tract of land, two leagues in front, and three leagues in depth, along *Lake Champlain*, beginning from the corner of the seignory granted to the *Sieur Pean*, with the title of *Fief and Seignory*, with the various rights annexed to such seignories, on condition of paying homage at the castle of *St. Louis*, at *Quebec*, &c. &c. according to the custom of *Paris*, observed in the same province; and reserving mines, minerals, and land for roads, forts, &c. This grant was ratified the 8th of *February*, 1735.

This court will not take notice of claims to lands within this state, under grants made by the French government in *Canada*, prior to the treaty between *Great Britain* and *France*, in 1763. Those claims, being, at most, but equitable, and afford-

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ing no evidence of a legal title, that can be recognized by a court of law, which looks only to titles, under patents from this state, or the former colonial government of the province of *New-York*. It appears, that those *Canadian* claims were pronounced by the colonial assembly, in 1773, to be wholly unfounded.

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The defendant also produced the articles of capitulation between *General Amherst*, commander in chief of the *British* forces in *North America*, and the *Marquis de Vaudreuil*, governor and lieutenant-general of *Canada*, dated at *Montreal*, the 8th *September*, 1760. By the 37th article of this capitulation, the lords of manors, the military and civil officers, in town and country, are preserved in the entire and peaceable property and possession of all their goods, estates, and effects, movable, and immovable; and with liberty to keep, sell, or let them to the *French* or *English*, to receive the produce of them in specie, bills of exchange, or otherwise, whenever they shall think proper to go to *France*, paying freight according to the 26th article.

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By the fourth article of the treaty of *Paris*, dated the 10th *February*, 1763, *Canada*, and all its dependencies, is renounced by the king of *France*, and ceded in full right to *Great Britain*. *Great Britain*, on her part, grants to the inhabitants of *Canada*, the free enjoyment of their religion, and that the subjects of the king of *France* may retire *with entire freedom and safety, whenever they think proper, and may sell their estates, provided it be to the subjects of the king of *Great Britain*, and may emigrate with their effects, without restraint, except for debts and crimes; and the period of such emigration is limited to 18 months, to be computed from the day of the exchange of the ratification of the treaty.

The plaintiff then produced copies from the minutes of the governor and council of *New-York*, at a court held at *Fort George*, in the city of *New-York*, the 21st *October*, 1768, from which it appeared, that by an order of the king and council, on the 12th *August*, 1768, the king approved and confirmed the agreement between *Sir Henry Moore*, governor of *New-York*, and the commander in chief of the province of *Canada*, for fixing the division line, between the two provinces, at the 45th degree of north latitude, conformable to the limit laid down by the king's proclamation of *October*, 1763, "provided that nothing therein contained, should extend to affect his majesty's new subjects, having possessions under proper titles, or those tracts of land on the south side of this line, the dominion of which was not disputed, on the part of the crown of *Great Britain*; and provided, also, that the determination shall not operate wholly, to deprive his majesty's new subjects, of such concessions on the south side of the said line, on which they may have made actual settlement and improvements, although the lands may have been disputed by the crown of *Great Britain*; but that such possessors shall be entitled to so much of the said concessions, as shall be proportioned to the improvements, at the rate of 50 acres for every 3 acres of improvements, provided they shall take out grants for the same, under

the seal of the province of *New-York*, subject to the usual quit-rents; and provided, also, that the grant to no one person shall exceed 20,000 acres."

By order of the governor and council of the province of *New-York*, made the 14th *August*, 1771, it was ordered, that a proclamation issue, notifying to all persons, holding, *or laying claim, under titles derived from the government of *France*, while in possession of *Canada*, to any lands upon *Lake Champlain*, northward of *Crown Point*, and to the southward of the 45th degree of north latitude, to transmit to the secretary's office, of the province, within three months from the date of the order, exemplifications of the original grants, together with satisfactory evidence of the situation of the lands, therein mentioned, and of the solidity of the titles of the claimants thereof, at the time of the surrender of *Canada* to the crown of *Great Britain*, to the end, that the government of the province might be enabled to give the claims under such *French* grants, the attention they should appear to merit. On the 25th *August*, 1771, the governor of *New-York* wrote to the commander in chief in *Canada*, enclosing a copy of his proclamation, made pursuant to the order of the council of the 13th of the same month.

It also appeared from the minutes of the council, that in *December*, 1771, the commander in chief of the province of *Canada* transmitted to the governor of the province of *New-York*, abstracts taken from the public register, deposited with the secretary of the province of *Canada*, which were closely searched, containing the grantees' names, those of the new proprietors, the dates of the grants, and of their ratifications, those granted *en seigneurie*, and those *en rature*, (in socage,) and copies of the *French* king's edicts and declarations, relative to grants of lands which had the form of law. From these it appeared that the governor and intendant, or in case of their death or absence, those who executed their offices, had the power of granting lands, to be ratified by the king in twelve months, and were the sole judges, in case of a reunion to the royal demesne, where the grantors had not complied with the conditions of their grants, which reunion, however, did not take place until after a hearing upon legal process, issued at the instance of the king's attorney-general. A sentence of reunion of several grants, made on *Lake Champlain*, by Governor *Beauharnois*, and the intendant, *Hocquart*, dated the *10th *May*, 1741, appeared among the papers, in the register office, but no complete reunion of grants of lands in that part, subsequent to that period.

On the 6th of *January*, 1772, a committee appointed by the governor and council of the province of *New-York*, and to whom was referred the papers relative to the *French* claims to

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lands on *Lake Champlain*, presented their report, (a) in which they express their opinion, that the governor *might issue patents for the lands southward of *Crown Point*, and to lands

(a) The report of the committee is as follows: "That soon after his majesty was pleased, by his royal proclamation of the 7th October, 1763, to declare the 45th degree of northern latitude to be the boundary between this and the province of *Quebec*, divers tracts of land were granted under the great seal of this province, to the northward of *Crown Point*, on both sides the *Lake Champlain*, and chiefly to the reduced officers and soldiers, claiming his majesty's bounty, graciously promised by that proclamation; that Sir *Henry Moore*, and *M. Carlton*, the governors of the two provinces, fixed the place of latitude of 45, by actual observation, near the north end of the lake, in the month of *September*, 1767; and that on the 12th of *August*, 1768, his majesty was pleased to declare his approbation in privy council, and to direct in favor of his new *Canadian* subjects, that nothing in the order of that date contained, should affect the property of such as had possessions, under proper titles of lands, on the south side of the line, the dominion of which was not disputed on the part of the crown of *Great Britain*; and that the said determination should not operate wholly, to deprive them of such concessions, on the south side of the said line, wherein they had made actual settlements and improvements, although the said line might have been disputed by the crown of *Great Britain*; but that they should be entitled to so much of the said concessions as should be proportionate to their improvements, at the rate of fifty acres for every three that were improved, with proviso that grants should be sued out, under the seal of *New-York*, subject to the usual quit-rents, and that a grant to one person should not exceed 20,000 acres. The committee have examined the council books, and cannot discover that the government of *Quebec* ever gave the least intimation to this province, of any *French* grants upon *Lake Champlain*, neither before nor after the said order of *August*, 1768, until excited thereunto by your excellency's late proclamation; nor is there any entry to be found of any notification of such claim, by private persons, nor even of any application for any grant, or confirmation, under this government, for lands granted in *Canada*, before the surrender of that country. The committee therefore conceive that it was a natural and reasonable presumption, either that there was no such *French* grants, or that the grantees, and their assigns, considered them as invalid, and perhaps forfeited to the *French* crown, before the conquest, or that they declined the acceptance of *British* confirmations, subject to quit-rents, and new patent charges, intending to set them up as sufficient, under the articles of capitulation, in the courts of law, upon the supposition that they were within the ancient dominions of the crown of *France*; and agreeably thereto, this government began again to grant lands in that quarter, and continued the practice, until your excellency was pleased to communicate to the council his majesty's 50th instruction, prohibiting patents for lands, to the northward of *Crown Point*, claimed under *French* titles; and if the late grants of this province are detrimental to these claimants, the committee are of opinion, that the blame falls upon themselves, as it is owing to their neglecting to give the information, naturally to be expected, if they intended to submit to, and take advantage of, the royal order of the 12th *August*, 1768. The committee observe, that among the papers now transmitted from *Quebec*, there are no *French* concessions and ratifications of any of the lands mentioned in the list of those said to be granted *en roture*, nor for several of these on the list *seigneuries*, besides those specified in Mr. *Cramache's* letter, to your excellency; nor is there a single petition sent, or preferred by either of those claimants, for a confirmation under this province, of any of their grants, which is the more extraordinary, as your excellency's proclamation required a full exhibition of their titles, and the crown is greatly interested in the question, concerning the validity of the *French* claims in the articles both of quit-rents and escheats, their pretensions extending not only to a vast quantity of land, but to lands the more valuable for their contiguity to the forts and passes, and the navigable waters of the lake; and from the whole we conjecture, that this conduct is owing to their adopting an opinion, which deserves a serious attention, to wit: That the lands they claim are situated to the northward of the ancient *British* claim, and that consequently they can maintain a title under the surrender, without the aid of the crown, and free from the usual reserva-

northward of that fort, not within the *French* grants, as not within the 50th article of the *royal instructions of the 24th *July*, 1771, (a) and that for all lands northward of *Crown*

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tions, restrictions, conditions, and quit-rents. With respect, therefore, to the lands southward of *Crown Point*, and to those to the northward of that fort, not within the limits of the *French* grants, we are of opinion that your excellency may issue patents for them, as lands to which the 50th article of the royal instructions has clearly no relation. Nor do we think that article ought to be considered to prohibit the grant of those tracts, to which no *French* concessions or ratifications appear to be transmitted from *Quebec*, nor any excuse assigned for not laying them before this government, pursuant to the late proclamation, it being very plain from the instruction, that it was intended to restrain only new patents for lands, before claimed by titles derived from the *French* king, and prior to the surrender of *Canada*, and as clear that it was an indispensable duty of all such claimants, in justice to the crown, to give due notice of their claims. But in due deference to his majesty's authority, we advise, as to the lands northward of *Crown Point*, and included by the concessions and ratifications lately notified to this government, that all petitions for them or any part of them be sent home, together with copies of the *French* grants, for his majesty's royal consideration. Several points of inquiry will arise upon those grants, concerning which the committee choose not to decide, on account of their singular importance and delicacy: 1st. Whether a title, if good under the *French* government, will, by the surrender, be valid by our laws, without the royal confirmation; or in other words, whether the capitulation gives more to the *French* grantors, than an equitable right to be preferred before others, in the application for a new grant. 2d. Whether those lands were not forfeited to the crown of *France*, by the conditions in the grants, before the surrender, and so became thereby transferred to his majesty, &c. 3d. Whether they were not within the ancient *British* claim, and consequently never grantable by the crown of *France*. And upon this last question, the committee beg leave to remark, that the *British* claim of dominion, before the last war, extended to the southerly bank of the river *St. Lawrence*, and by treaty, to all the country of the six nations in particular, of which the controverted grants are a part; and we find, that so early as the third of *September*, 1696, a patent did pass to *Godfrey Delliis*, under the seal of this province, for lands, including some of those now claimed under the *Canadian* grants, greatly to the northward of *Crown Point*, of which the *French* were not possessed, till near forty years afterwards, to wit, about the year 1731; and whether it is imputable to a consciousness in the *French* of their want of title, or to any other cause, the committee cannot help observing to your excellency, that, in fact, very few settlements, or improvements, were formed upon any of those *Canadian* grants, except about the *French* forts, at or since the conclusion of the last peace; the country near *Lake Champlain*, but for the late settlements under this colony, being, in general, in a wild and uncultivated state; and as it may be of essential moment to the reduced officers and soldiers, and others who have seated themselves in that district, that his majesty be fully informed of the numerous patents that have passed the seal of this colony, since the acquisition of *Canada*, we recommend it to your excellency, to order the surveyor-general to frame a map, exhibiting the *French* grants and *English* patents, to the northward of *Crown Point*, to be laid before his majesty, with all convenient speed, with a list of the patentees, and an account of the quantity of land contained in their patents, and the quit-rents they are chargeable with; and for the security and satisfaction of the *French* grantees, we also advise, that, in the interim, the several papers referred to us, be filed in the secretary's office, and a copy of this report, and the order to be made thereon, transmitted to the commander in chief of *Quebec*."

(a) This article of the instructions of the king and council is as follows:—
"Whereas sundry persons, proprietors under titles derived from the crown of *France*, when that crown was in possession of *Canada*, of lands on that part of *Lake Champlain* now lying within our province of *New-York*, have humbly represented unto us, that several parcels of the said lands so claimed, have already been granted to other persons by letters patent, under the seal of our said province of *New-York*, and have, therefore, humbly prayed, that a proceeding so

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Point, and included by concessions and ratifications, notified to the government of **New-York*, the petitions and all papers should be sent home to the king and council, for their consideration.

It appeared, also, that by a declaration, or arret of the king of *France*, dated the 19th *October*, 1676, sent to the governor and intendant of *Canada*, that all grants for lands were to be laid before the king for his confirmation, within one year from their date, and in case of failure, they are declared *ipso facto* void; and that all grants of lands were to be on the condition of clearing the land in six years, and on failure of the condition, the grants to be null and void; and all grants are directed to be made contiguous to and adjoining each other: and by the *arrets* of the king and council, dated the 6th *July*, 1711, and the 15th *March*, 1732, all lands granted *en seigneurie*, or *en roture*, on condition of clearing and settling them, and which were not cleared and settled within one year from the publication of the arret, are declared to be reunited to the crown. By an arret of the king, dated the 17th *July*, 1743, the governor and intendant of *Canada* and *New France* were directed to cause all the grants of lands forfeited to be reunited; and the rules were particularly laid down, by which the proceedings, in cases of the reunion of grants, were to be regulated.

It appeared, also, that at a superior council, held at the castle of *St. Louis*, in *Quebec*, the 10th of *May*, 1741, at the instance of the attorney-general, proceedings were had in regard to various grants, alleged to be forfeited to the crown; and the court pronounced judgment of reunion, amongst others, for the lands granted, on the 11th *April*, 1733, to *La Gauchetiere*.

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The plaintiff also produced a copy of a conveyance, dated 14th *September*, 1726, from the sachems of the five nations, confirming and ratifying the surrender of all their *lands to the king of *Great Britain*, made the 19th *July*, 1701, to be protected and defended for the use of the five nations, their heirs, and successors; a copy of a paper, filed in the secretary's office, endorsed 1688, purporting to be a report of certain commissioners of the king of *England*, by which it appears,

prejudicial to their rights and pretensions, may receive our royal disapprobation: and whereas it appears both just and equitable, that the claims of persons, under such titles as aforesaid, should not be affected without the fullest examination thereof: It is therefore our will and pleasure, and you are thereby directed, and required in no case to make any grants of lands, so claimed as aforesaid upon *Lake Champlain*, to the northward of *Crown Point*, within the province of *New-York*, until the petitions and proposals for grants of any part or parts of such lands shall have been transmitted to one of our principal secretaries, of state, in order to be laid before us, and until our approbation thereof shall have been signified to you, our said governor, or to the commander in chief of our said province, for the time being."

that his majesty had considered the five nations as his subjects, pursuant to a voluntary submission by them to the crown of *England*, made the 30th *July*, 1684, before the governor of *Virginia*, and *New-York*, and was determined to protect them as his subjects against the *French*.

Several other papers were produced, to show the submission of the five nations to the *English* government, and the protection afforded them, and also the opposition made by the governors of the *English* colonies, to the encroachments of the *French*, and particularly to the building of the fort at *Crown Point*, and on *Lake Champlain*.

The defendant also produced the following papers: a certificate of a survey, made, the 21st *February*, 1766, by one *P. J. Labrosse*, one of the royal surveyors of *Canada*, appointed by the governor of *Montreal*, the 20th *June*, 1764, at the request of one *Francis Mackay*, in which he states, that he surveyed the manor, accompanied by *Mackay*, and run the lines which are described; a permission in writing from *Mackay*, to one *Francis L. Moule*, dated the 3d *November*, 1775, to go on and take possession of a farm in the seignory of *La Gauchetiere*, on the west side of *Lake Champlain*; a grant dated the 15th *January*, 1744, from the *French* governor, and intendant of *Canada*, to the *Sieur Estebe*, of the seignory heretofore granted to *La Gauchetiere*, captain in the infantry, which is stated as having been reunited to his majesty's domains, by the decree of the 10th *May*, 1741; a ratification or confirmation of the same grant to *Estebe*, by the king of *France*, dated at *Versailles*, the 25th of *March*, 1745; a copy of a conveyance, dated the 22d *December*, 1757, from *Estebe* to *Marie Debreuil de Pontbriant*, bishop of *Quebec*, his heirs and assigns, of the same seignory or manor, and which, among *other things, was afterwards devised by the said *Marie Debreuil de Pontbriant*, to *M. Etienne de Montgolfier*, superior of the seminary of *St. Sulpice*, who, on the 27th *January*, 1768, executed a formal renunciation in writing, of the same seignory or manor, in favor of the heirs of *M. De Pontbriant*, lord bishop, &c.—a copy of a certificate from *Montgolfier*, dated 16th *May*, 1768, in which he certifies, that he claims no right or title to the said seignory, and a letter from him to *Francis Mackay*, in which he says, he sends him a quit-claim of all his right to the said seignory, by virtue of the will of the bishop *De Pontbriant*, which he wishes him to consider as gratuitous, and to enjoy the same, &c.

It was admitted, that in 1804, *Jonathan Schiefflin*, under whom the defendant claimed, had made leases to several persons in possession, in which was a proviso, that in case of any controversy, as to the right or title of *Schiefflin*, to the manor of *La Gauchetiere*, the lessees were to have no recourse against him for damages, &c.

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Several witnesses were produced on the part of the defendant, who testified that they went into possession of parcels of land, within the seignory or manor of *La Gauchetiere*, by permission of *Mackay*, in 1763, and in 1774, and continued in possession until the *American* war, when they left their possessions, and returned again in 1784; but they paid no rent to any person, while in possession.

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J. Emott, for the plaintiff. 1. The lessor claims under the patent from the province of *New-York* to *Dean*, in 1769. It is admitted, that the premises in question lie within the boundaries of that patent; it follows, that the plaintiff must recover, unless the defendant can show that the grant to *Dean* is inoperative. This he has attempted to do, by setting up two grants from the *French Canadian* government, one to *De la Gauchetiere*, in *April*, 1733, and the other to the *Sieur Estebe*, in *January*, 1744. The act of reunion, by the government of *Canada*, in *May*, 1741, *confirmed by the *arret* of the king of *France*, has annulled the grant to *De la Gauchetiere*. As there can be no doubt of the reunion of this grant, from the documents produced, and that it was done according to the laws of *France* or the royal edicts, it is presumed that the first ground of defence must be abandoned.

2. It is well known that about the year 1731, the *French*, in *Canada* and *Louisiana*, commenced a system of encroachments on the *English* colonies in *America*, for the purpose of confining the *English* to a narrow limit of territory along the sea-coast, and to connect the *French* colonies together, so as to surround the *English* on the west. In the same year, the *French* took possession of *Crown Point*, and from that time, until the peace of 1763, made grants on both sides of lake *Champlain* and the river *Chambly*, comprehending all the lands on both sides of the lake and river. All these grants, it will be contended on the part of the defendant, are protected by the capitulation of *Montreal*, in 1760, and the treaty of peace in 1763. The extent of the country comprehended in these grants renders the cause of great importance, and will excuse the counsel for the plaintiff for taking a wider field of argument.

We contend, that by a just construction of the capitulation of *Montreal*, and the treaty, they do not extend to the premises in question.

The 37th article of the capitulation of *Montreal* declares, that the inhabitants of *Canada* shall preserve the property and possession of their goods, or estates, movable or immovable. This article can apply only to the country of which the *French* were then possessed, and which they surrendered by that capitulation. It cannot extend to the country which they may have

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possessed at any time before, and which they called *Canada*. The history of this country shows, that at some periods the *French* advanced on the *English* colonies, and, at others, the *English* colonists gained on the *French*; and capitulations between the two colonial governments have been made at different times. In the year 1759, the *English* had made considerable advances *on the *French*, in various quarters, and had gained possession of all the country on lake *Champlain*, as far as the *Isle aux Noix*, which is beyond the 45th degree of north latitude. The *English* were then in actual possession of the country comprehending the premises in question, for twelve months prior to the capitulation of *Montreal*.

But preliminary conventions made between belligerents, relative to the territories of each, are subject to the final and more solemn stipulations of the definitive treaty of peace. By the 4th article of the treaty of *Paris*, the king of *France* ceded to the king of *Great Britain* the whole of *Canada*, in full sovereignty. The latter stipulates, that the subjects of *France*, in *Canada*, may retire, and for that purpose may sell their estates to *British* subjects. The right to emigrate is limited, however, to 18 months, and the treaty secured only a right to sell, in case the *French* emigrated within 18 months. In every other respect, the property of the people of *Canada* belonged to the king of *Great Britain*, to be disposed of according to the laws and usages of nations. As in the present case, there was no emigration or sale within the 18 months, the property in question is not protected by the treaty of *Paris*.

Then, if the grant has any effect, it must be under the law of nations. Now, by a simple conquest, ratified by a treaty of peace, the possessors of the conquered country are all at the mercy of the conqueror. It is true, that according to the general usage of nations, the possessor of property, in a conquered country, on consenting to become a subject to the new government, acquires an imperfect right to his property. It is, however, in the discretion of the victor, to recognize this right or not. In the present case, there has been no recognition of these *French* grants, on the part of the *British* government. On the contrary, it appears from the acts and proceedings of the colonial government of *New-York*, that these grants were not allowed; and that by the grant to *Dean*, the property in question was considered as a part of the domains of the *English* crown.

*3. But admitting that the *capitulation of Montreal* is operative, and comprehended the property in question; still, after the conquest and cession, the possessor of the *French* grant could retain nothing more than an *equitable* or *presumptive* right to a confirmatory grant from the *British* government. It never

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can be supposed that the *French* possessor was to hold his lands, according to the terms of the original grant, a tenure so different from those of *England*. It was a tenure *en seigneurie*, somewhat analogous to the ancient *English* tenure in *chivalry*. The holder was to pay *faith* and *homage*, at the castle of *St. Louis*, in *Quebec*, and all other dues, according to the custom of *Paris*. He was invested with the power of holding courts of justice; and by the *arrets* of the *French* king, he could not transfer his seignory, and was bound to grant his lands at a reasonable ground-rent. By the construction of the capitulation and treaty, for which I contend, the property is so far saved, that the grantee has a prior and equitable claim to a confirmatory grant from the new government. That this is the just construction, is evident from the opinions of the council of the colony of *New-York*, expressed at various times, and from the practice in similar cases.

By the 3d article of the capitulation between the *Dutch* governor of *New-York* and the *English* deputies, by which the former surrendered the possession of *New-Netherlands*, in *August*, 1664, it was stipulated, that "all the *Dutch* people should continue free denizens, and enjoy their lands, houses, and goods wheresoever they were in the country, and dispose of them as they pleased;" (*Smith's Hist. N. Y. Cary's ed.* 32.) yet we find, that the first act of *Nicolls*, the new governor under the duke of *York*, was to issue grants of confirmation to the *Dutch* patentees. (*Ibid.* 37.)

4. But we contend further, that an act of reunion of the grant to *Estebe*, is to be presumed. The grant to *Estebe* was in 1744. It is evident, from the tenor of these grants, that the great object was to have the lands settled, as the strength and safety of the colony depended on the increase of settlements. There is no evidence of any settlement attempted *on the land comprised within the grant, until after the treaty in 1763, nor any survey thereof made. It is certain that there had been, long before, a breach of the conditions on which the grant was made.

[He then went into a minute examination of all the facts and circumstances of the case, from which an act of reunion was to be presumed.]

Should it be said, that if there was an act of reunion, the record might be produced; it may be answered, that since the date of the grant, there have been three wars in *Canada*, and it is probable, that the records have been lost by some of the many casualties incident to a state of war. It would be for the interest of the *French* subjects to destroy these records; and before, or at the time of the treaty of peace, they were probably suppressed by them.

Again, as the king of *Great Britain*, by the cession in 1763, acquired all the rights of the crown of *France*, and the grant

had become forfeited by the non-performance of the condition, it reverted to the crown, and belonged to the king of *England*, without any office found. (*Stephen v. Potter, Cro. Car.* 100.)

5. The lands for which the grant to *Estebe* was issued, are not within the capitulation of *Montreal*, and the treaty of 1763, because they were not only within the territory claimed by the *English*, but actually a part of the province of *New-York*, at the time the grant was made. The *English* line or claim extended beyond the lands in controversy; and it will be sufficient, for the purpose of this argument, if it shall appear that there was a controversy existing, at the time, between the *English* and *French*, as to the northern boundary of the province of *New-York*, and that the former extended it beyond the lands in question. When, therefore, the *English* government, by the treaty of 1763, agreed to protect the property of *French* subjects in *Canada*, it must be understood to extend to grants in *Canada*, according to the *English* acceptance of the limits of that province, and this must be decided by the *English* courts. The *Dutch*, as early as the year 1649, claimed the country as far north as the *St. Lawrence* or *Canada* river. (*Smith's Hist.* 16.) In the duke of *York's* sub-grant, in 1664, the river *Canada* is assumed as the north line of the patent. In 1696, the *English* government granted to one *Dellius*, lands situated beyond *Crown Point*. Again, the *English* claimed the sovereignty over the five nations, who were regarded as subjects to *Great Britain*, and their territory as the domains of the crown. (*Smith's Hist.* 67.) That the claim was known to the *French*, is ascertained by the protest and speech of Governor *Dongan*, in 1686 and 1687. (*Smith*, 64.) It was solemnly recognized by the *French* themselves, in the treaty of *Utrecht*, March 31, 1713, (*Smith*, 150.) and the treaty of *Aix la Chapelle*, in 1748.

The fact of the establishment of the sovereignty of the *British* over this territory is proved by the history of the times. After the surrender of the *Dutch*, in 1644, *Carteret* had an interview with the chiefs of the five nations, and entered into a league of friendship with them, which continued uninterrupted for many years. (*Smith*, 35.) In July, 1701, a grant was made by the five nations to the crown of a vast tract of land, (*Smith*, 113.) comprehending the territories at the west end of lake *Erie*, and the north side of that lake and lake *Ontario*; and in 1726, those nations, by a solemn treaty made with governor *Burnet*, surrendered their whole country, south of the lakes, to the *British* crown, to be held for their use, and confirmed the prior cession of 1701. (*Smith*, 186, 187.) By these treaties of cession, these *Indian* nations acknowledged the *British* king as their sovereign and protector, and the *British* considered them as subjects of the crown, and protect-

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ed them, on all occasions, against their enemies. That the lands in controversy are comprehended in the country possessed by the five nations, is an undoubted historic fact. (*Jeffers. Notes on Virg. App. note 5. Smith's Hist. 56. 151.*) The committee of the council of the province of *New-York*, as appears from the records referred to in the case, considered it, in 1772, as a fact not requiring any proof; and it is within our own recollection, that these claims extended over all the north part of this state, and have been extinguished by government.

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*But it may, perhaps, be said, in support of the *French* grants, that they were made while the *French* were in actual possession of the country by conquest. But such a possession, according to the law of nations, gives no right. (2 *Ruth. Inst.* 461. B. 2. ch. 9. sect. 7.) No right can be acquired by a wrongful possession, unless it be afterwards acquiesced in, or conceded by the true owner.

Van Vechten and Woodworth, contra. 1. The defendant claims under the grant to *Estebe*. It is said, on the other side, that a resumption of this grant, by the crown of *France*, is to be presumed. We contend, that no act of reunion ever took place, nor is there, in the case, sufficient evidence to warrant such a presumption. The survey of *Mackie* is wholly inconsistent with the idea, that the grant had been resumed. That survey, too, was made by a royal surveyor, who would not have undertaken the survey, had the grant been extinguished by an act of reunion. Again, the act of reunion was to be made in a particular manner, with the forms and solemnities of a judicial act; as in our law a grant must be avoided by an act as solemn and notorious as the grant itself. There must be some record of such a proceeding; but no record of any act of reunion has been produced, except of the grant to *La Gauchetiere*. Want of possession by the grantee, or the persons claiming under him, does not afford sufficient ground for the presumption, that the grant has been resumed. Immediate and successive wars in the country sufficiently account for the want of possession. The premises lay on the frontiers, exposed to the incursions of the belligerent parties. This situation would afford an adequate excuse for not performing the condition of the grant, by making a settlement, and it is fair to presume that such an excuse was received by the *French* government. One *Lafomber* went on the land in 1763, and persons of the name of *Goude* and *Swarthe* settled there before the *French* war. *La Monte* took possession in 1774, and, though interrupted by the subsequent war, he resumed his possession in 1784.

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*In *December*, 1757, but three years before the capitulation of *Montreal*, *Estebe* conveyed the tract of land in question to 154

the *bishop of Quebec*, with warranty; and it is not probable that he would have executed such a deed to such a person, if the land had been resumed by the crown. These conveyances were executed before public notaries, and were matters of record. It is sufficient, if the defendant can show a title out of the lessor; but he has shown a title derived from the grantee. *Montgolfier*, in 1768, made a formal renunciation, or release, in favor of the heirs of the *bishop of Quebec*. *Mackie* claimed as one of the heirs, and was admitted to be an heir by the release of *Montgolfier*. From that period, *Mackie*, and the persons under him, have claimed the land, and exercised acts of ownership over it. Though the patent to *Dean* was granted in 1769, there is no proof of any possession under it.

It may be objected, that the lease to *La Monte* was of lands in the seignory of *La Gauchetiere*, which had been resumed; but this was merely a name of description, the first grant having been made to *La Gauchetiere*.

2. The title of *L'Estebe* was protected by the capitulation of *Montreal*, and the treaty of 1763. The estates of the *French* inhabitants were preserved, and they had a right to sell. The power to emigrate was limited to eighteen months after the treaty, but not the power to sell, which was unrestrained, except that the sale was to be made to *British* subjects. By the modern law of nations, individuals in conquered countries are secured in their rights of property. (*Vattel*, 575. l. 3. c. 13. § 200.) By the acts and declaration of the *British* government, the line drawn from the 45th degree of north latitude was not to affect the king's new subjects holding titles to lands south of that line; and it was provided, that actual settlers should have 50 acres of land for 3 acres improved. By the treaty of 1763, the *French* king merely renounced his right of sovereignty over *Canada*; the *French* who chose to remain subjects of *Great Britain*, retained all their rights of property. Those who held legal titles under the *French* government, and were entitled to retain possession *of their lands, would continue to have a right to hold them to the same extent, under the *English* government. The act of parliament, of 14 Geo. III. c. 33. though relative to the province of *Canada*, shows the sense given by the *British* government to the treaty of 1763, which was to secure the rights of property to all the inhabitants of the country, who took the oath of allegiance to the crown of *Great Britain*. The only inquiry of the new government would be, whether the grants were valid at the time of the surrender by *France*. The conduct of governor *Nicoll*, in confirming the *Dutch* grants, has been mentioned; but that may have been for the purpose of raising money, and not because such confirmatory grants were abso-

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lutely necessary. Again, it is said, that the patent to *Dean*, connected with the treaty, is substantially a resumption of the *French* grant; but if the treaty confirmed and vested the rights under those grants, they could not be again divested by any acts of the *English* colonial government. The want of notice of these grants cannot be objected, as the *English* government was in possession of all the records. Again, it is not necessary for the defendant to prove, that the conditions of the royal grant were performed. *Dean* has no right to demand such proof. It belongs only to the crown, or those invested with the royal prerogative, to inquire into the performance of the conditions of the grants. The *English* government might enforce the performance in any manner it thought equitable.

3. The property, at the time of the grant to *Estebe*, was within the boundary of the province of *Canada*. The *French* were the first possessors of this country. (*Chalm. Pol. Annals*, 80. 82. 568. 585. *Smith*, 43.) In 1638, the country north of *Albany* was called by the *Dutch*, *Terra Incognita*. (*Smith*, 16.) In 1674, *New France* was taken by the *English*. In 1678, Governor *Andross* speaks of the lakes as the northern boundary of *New-York*. In 1668, *New France* was restored by the *English*, without any specification of its limits. In 1672, *New-York* was retaken by the *Dutch*, who claimed the country ten miles north of the *Hudson* river. (*Chalm. Polit. Annals*, 579.) The *French* held the country by right of prior discovery, and by right of conquest. Their rights were acquiesced in by the *Indians*, and the limits of *Canada*, as fixed by the *French*, were recognized by the *English* in their treaties. The five nations did not reside within two hundred miles of the premises in question. If they had been driven from their lands by the *French*, their surrender and submission to the *English* could not transfer territory of which they were dispossessed. Besides, this subjection was very equivocal, and, at best, merely nominal. By the treaty of neutrality in 1686, the seventh article of the treaty of *Ryswick*, in 1677, the second article of the treaty of *Madrid*, in 1721, and the second article of the treaty of *Seville*, in 1729, *France* was confirmed in all her territories and possessions, which she held, by discovery or conquest, in *America*. (*Chalm. Treaties*.) The fort of *Crown Point* was erected by the *French*, in 1731. In 1732, the governor and council of the province of *New-York* inquired of the *Indian* commissioners, to whom the lands at *Crown Point* belonged; to the five nations, the river *Indians*, or the *French*? This shows, that the *English* did not consider themselves as the proprietors of this part of the country. In 1757, the northern limits of the province of *New-York* were wholly undefined. By the map of *Evans*, pub-
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lished in 1755, the *English* claimed their northern boundary no further than *Otter Creek*. The very name of *Lake Champlain* shows its *French* origin. The grant to *Dellius* was vacated, without ever having been carried into effect. Under the law of nations, a possession acquired by conquest, or first discovery, is a rightful possession. The *French* exercised acts of ownership over the whole country to which their claim extended. They built forts, and began settlements. These were conquered and restored, at different times, and no precise line was drawn between the *English* and *French* provinces. The line of jurisdiction established in 1768, between *Canada* and *New-York*, incontestably proves, that the respective limits of those provinces was not before well ascertained. In establishing the line at the 45th degree of *north latitude, provision is made that it shall not affect private rights, acquired under the *French* government, prior to that period.

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Emott, in reply, after making a few observations, was stopped by the court.

Per Curiam. This court cannot take notice of any title to land not derived from our own government, and verified by a patent under the great seal of the state, or the province of *New-York*. Whether claimants to lands within this state, founded on *French* grants, might not have had an equitable claim on the government, under the capitulation of *Montreal*, in 1760, or the treaty of 1763, is a question, with which this court has no concern. Such a claim might have been presented and urged to the government, but it does not afford that evidence of legal title which can be recognized by this court. We can look no further than to the titles derived under our own grants. This has been the uniform sense of our courts, from the first establishment of the *English* government in the colony of *New-York*.

The claim set up in this case, under the *French* grant, is not a new pretension. These claims were a subject of discussion with the government, before the *American* revolution, though this, perhaps, is the first instance in which it has been attempted, in a court of law, to enforce the claim, in opposition to a grant under the great seal of the state. In the year 1773, the colonial assembly published an elaborate vindication of the grants made under the seal of the province of *New-York*, up to the *Canadian* line, "upon the principle of original right, treaty and cession, law and justice, equity and policy." They declared, that the *Canadian* claims to lands south of the 45th degree of north latitude, were "extravagant and destitute of all foundation." But we do not think it necessary to

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look into the *equity* or merits of the claim. It is sufficient here, that it does not appear in the shape of a legal title. The *statement* published by the colonial legislature is referred to, principally, to show *their opinion, at that early day, on the question; and it appears, that, by an order of the privy council in *England*, of the 12th *August*, 1768, (set forth in the statement,) no *Canadian* claim to lands south of the 45th degree of north latitude was to operate, unless such claim was consummated and confirmed by a grant, "under the seal of *New-York*."

We are, therefore, of opinion, that the plaintiff must have judgment.

Judgment for the plaintiff.

ALBANY,
Feb. 1809.FODEN
and another
v.
SHARP.CLARK *against* BARLOW.

THIS was an action of *covenant* for non-payment of *rent*, and the only question submitted to the court was, whether the plaintiff was entitled to recover *interest* on a rent, being a specific sum, payable in *money*.

Interest is allowable in an action of *covenant*, for a certain sum due for rent, and payable in money.

Per Curiam. We are of opinion, that in an action of *covenant* brought to recover a sum certain, due for rent, and payable in money, the plaintiff is entitled to recover the interest.

FODEN and SLATER *against* R. SHARP, who is impleaded with J. SHARP.

SEDGWICK, for the defendants, moved to set aside the verdict, taken by default in this cause, for *irregularity*, and also on the *merits*, and asked whether it was to be heard as a non-enumerated motion.

The court said, that it must come on to be heard as an enumerated motion.

*It appeared that the declaration contained several counts, for goods sold and delivered, and on a bill of exchange, drawn by the plaintiffs at *Manchester*, in *England*, (payable to themselves, or order,) on the defendants, and accepted by them, to be paid at a mercantile house in *London*. John Sharp, one of the defendants, and partner of Robert Sharp, the other defendant, was in *England*, and accepted the bill there, and a demand of payment was made here on Robert Sharp, who alleged that he did not know on what account the bill was drawn, nor did it appear that the bill had ever been presented to the defendants, at the house in *London*, where it was made payable,

Where a bill of exchange is drawn in *England*, and payable there, the holder can recover only 5 per cent. interest.

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The acceptor of a bill of exchange, in a suit against him, cannot object to a protest for non-payment, that it does not state that a demand was made on him personally; it is sufficient, if it be stated, that payment was demanded at the house or place where the bill was accepted, to be paid. (a)

A motion to set aside a verdict for irregularity, and also on the *merits*, is an enumerated motion.

(a) *Wolcott v. Fan Santvoord*, 17 Johns. Rep. 246.

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and that the first knowledge he had of the bill, was an application here for the payment of it.

On taking the inquest in the cause, the only evidence offered to the jury was the bill of exchange, and a protest made in *London*, for non-payment. The protest stated, that the demand of payment was made of a clerk of the house where the bill was payable, according to the acceptance; but did not mention that any demand had been made of the defendants. The jury, in assessing the damages, allowed interest at the rate of 7 *per cent*.

Harison, for the plaintiff.

Per Curiam. The holder of a bill of exchange need not show a demand of payment of the *acceptor*, any more than of the maker of a note. It is the business of the acceptor to show, that he was ready, at the day and place appointed, but that no one came to receive the money, and that he was always ready, afterwards, to pay. In *Smith v. Delafontaine*, (*Bayley*, 78. note *a*.) it was so decided. The bill having been drawn in *England*, and made payable there, the plaintiffs were entitled to 5 *per cent*. interest only. A sum must, therefore, be deducted from the verdict, equal to the difference between 5 and 7 *per cent*. interest. The residue of the motion must be denied, and the plaintiffs are to pay the costs of the application.

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ALBANY,
Feb. 1869.FLACK
v.
EAGER.*FLACK and FLACK *against* EAGER and another,
bail, &c.

GOLD, in behalf of the defendants in this cause, moved that the proceedings in the cause should be set aside, and an *exoneretur* entered on the bail-piece, in the original cause.

The defendants were sued as bail to the sheriff in an action brought by the plaintiffs against one *Denniston*. They became special bail in the cause, and the bail-piece was filed in the clerk's office on the 30th *November*, 1807. An *exception* was entered on the bail-piece without date, notice of which was given on the 9th *December*, 1807. A declaration was filed, *de bene esse*, in the same suit, on the 8th *January*, 1808, and a rule to plead entered. The defendants did not attempt to justify, nor was any other bail substituted in the cause. On the 5th *July*, 1808, a default was entered, on which an interlocutory judgment was entered, on the 5th *August*, 1808. A final judgment was obtained, and the same signed and docketed, on the 2d *September*, 1808. To recover the amount of this judgment, the present suit was brought against the defendants, as the bail of *Denniston*, who had become insolvent, and was in prison, in *Philadelphia*. It appeared, that the exception entered on the bail-piece had never been erased, nor had any notice been given to the defendants, that it had been waived by the plaintiffs. *Humphrey v. Leite* (4 *Burr.* 2107.) was cited.

Where bail was put in, and the plaintiff entered an exception on the bail-piece, and afterwards proceeded in the cause, without any justification of bail, or new bail, and obtained a judgment, it was held to amount to a waiver of bail, and that he could not proceed against the bail, to whom he had accepted. No formal notice of a waiver of bail is necessary.

Henry, for the plaintiffs.

Per Curiam. The defendants were entitled to make this application at any time; and they have applied, as soon as they were called on, as bail. The case of *Humphrey v. Leite* (4 *Burr.* 2107.) is in point. There has been a waiver of bail in this case, and no formal notice of the waiver was necessary. The motion must be granted, with costs.

Rule granted.

ALBANY,
Feb. 1803.

JACKSON
v.
GREEN.

*GENET *against* MITCHELL.

Where the subject matter of a libel related to a remote transaction, and though concerning the conduct of a foreign minister resident here, but who had long been superseded, a struck jury was not allowed.

RUSSEL, in behalf of the plaintiff, moved for a struck jury in this cause. It was an action for a libel; and the publication related to the conduct of the plaintiff while he was a minister of the *French* republic to the *United States*.

Van Schaick, contra.

Per Curiam. This case does not come within the scope of those cases in which special juries have been allowed, where official characters were libeled. Though questions of law may be involved, yet they can no more be decided by a special, than by a common, jury. The subject matter of the libel, in this case, is a remote transaction, having taken place fifteen years ago, and the cause does not appear to be of that "importance," as to require the extension of the rules that have been established relative to struck juries.

Rule refused.

JACKSON, *ex dem.* CARR, *against* GREEN.

Where a lease was assigned, and a bond executed at the same time, which stated that the assignment was made to secure a debt due to the assignee, and an agreement to re-assign the lease and premises, on payment of the money with interest, it was held to be a mortgage, and that the mort-

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gagor was entitled to a notice to quit, before bringing an action of ejectment against him.

THIS was an action of ejectment for land in the town of *Berlin*, in the county of *Rensselaer*. The cause was tried before Mr. Justice *Yates*, at the *Rensselaer* circuit, in *October* last.

The plaintiff produced and proved a lease of the premises from *Stephen Van Rensselaer* to *Josiah Godfrey*, dated the 29th *December*, 1790, for the term of sixty years. An assignment was endorsed on the lease from *Godfrey* to *Increase Green*, dated the 6th *April*, 1805: Another assignment was also endorsed, of the same date, from *Increase Green* to the defendant; and an assignment, dated the 8th *April*, 1805 from the defendant, of the lease, and all his interest in the premises, to *Carr*, the lessor. The defendant was proved to be in possession of the premises.

*A bond from the lessor of the plaintiff to the defendant, was proved and read in evidence, dated the 8th *April*, 1805 to which there was a condition, reciting the assignment of the lease from the defendant to the lessor, for securing the payment of 500 dollars, one half on the 1st day of *February* following, and the other half on the 1st *February*, 1807, with

interest; and that, if the defendant should pay the money at the times specified, and the lessor should lawfully transfer the lease and premises back to the defendant, then the bond was to be void, &c. It was contended, that the assignment and bond was a conveyance, in the nature of a mortgage, and that the defendant was entitled to six months' notice to quit, before bringing the action; and the defendant moved for a nonsuit. But, by direction of the judge, a verdict was taken for the plaintiff, subject to the opinion of the court, on the question whether the defendant was entitled to a notice to quit

ALBANY,
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JACKSON
v.
GREEN.

Van Vechten, for the plaintiff.

Foot, contra.

Per Curiam. The assignment is, of itself, absolute, in form; but from the bond which accompanies it, it appears to have been made, by way of mortgage, and can have no greater or other effect than a mortgage. It is, therefore, within the case of *Jackson, ex dem. Benton, v. Laughead*, and the defendant is entitled to a notice to quit. The verdict must be set aside, and a nonsuit entered.

Judgment of nonsuit.

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Feb. 1809.

HOYT
v.
PETERSON.

***HOYT against PETERSON.**

Where a judgment was obtained in the Justices' Court, in New-York, on which a *certiorari* was brought to this court, and the defendant, being taken on a *ca. sa.*, in the court below, paid the money into that court, and was discharged, and afterwards the judgment below being affirmed in this court, the attorney of the defendant in error issued a *ca. sa.* on the judgment in this court against the plaintiff in error, for the amount of damages and costs recovered in the court below, and the costs of error, which were paid to the sheriff; this court ordered the money to be refunded, with costs to be paid by the attorney, and a satisfaction to be endorsed on the *ca. sa.*

ON the 5th September, 1807, the defendant in error recovered against the plaintiff in error, as surviving partner of *Hoyt & Tom*, a judgment in the Justices' Court, in New-York, for 213 dollars, and which was removed to this court by *certiorari*. On the 9th of September, the plaintiff in error was taken on a *ca. sa.* issued out of the Justices' Court, and, being in custody, he obtained a *certiorari*, returnable in this court in November, 1807, and thereupon moved the court below, to be discharged from the execution, but the court refused to discharge him; on which he paid the amount of the execution to the clerk of the court below, and took his receipt for the same. This was done by the direction of the court, and on payment of the money, he was discharged. There were three other causes in the same situation, in all of which writs of *certiorari* were brought to this court, and the judgments below affirmed. (3 Johns. Rep. 518.) In December last, executions were issued against the plaintiff in error, on the judgments of affirmance in this court, not only for the costs in error, but for the amount of damages and costs recovered in the court below, the whole of which was paid to the sheriff by the plaintiff in error, with the poundage.

Harison now moved for a rule, that the moneys levied on the executions, in each of the causes, except the costs taxed in error, be refunded to the plaintiff in error, by the sheriff, with the poundage paid, and in case the same should have been paid over to the attorney of the defendants below, that then the attorney should refund the same, and pay the costs of this application, and that satisfaction be endorsed on the executions.

Ostrander, for the defendant in error.

Per Curiam. Take your rule, with costs, which must be paid by the attorney, and let satisfaction be endorsed on the execution.

Rule granted.

ALBANY,
Feb. 1809.CAVERLY
v.
NICHOLS.*CAVERLY *against* NICHOLS and BROWN.

THIS was an action of debt on a bond, conditioned, that if the defendants should, within 12 months, procure a patent or other conveyance, sufficient to enable the plaintiffs to sell, in fee simple, a certain parcel of land in *Canada*, then the obligation was to be void, otherwise to remain in full force. The declaration was in the usual form, and the defendants pleaded, first, the general issue; secondly, that they well and truly kept and performed all the covenants, articles, &c. contained in the condition of the bond, &c., and concluded with a verification. The plaintiff replied generally, that the defendants had not kept and performed all the covenants, articles, &c. contained in the conditions of the said bond. On this issue, the cause was tried at the *Ulster* circuit, in *June*, 1806, and the jury found a verdict for the plaintiff, for six cents damages and six cents costs. The plaintiff entered up judgment on the verdict, and, in *January* last, took out a *ca. sa.* against the defendants for 400 dollars of debt, being the penalty of the bond, and 89 dollars and 50 cents for damages and costs.

In an action of debt on a bond, conditioned to procure a conveyance for land, the defendant pleaded the general issue, and also that he had performed the condition, &c. The plaintiff replied generally, that the defendant had not performed, &c. and the jury found a verdict for the plaintiff with six cents damages and costs, on which the plaintiff entered up a judgment, and issued an execution for the penalty in the bond. The court, on motion, ordered the execution to be set aside, with costs. The plaintiff ought to have assigned breaches, on which the jury ought to have assessed damages.

Fisk, for the defendants, now moved to set aside the execution, and that all further proceedings on the judgment should be stayed, on the defendants' paying to the plaintiff the amount of the verdict. He contended, that the plaintiff, by the act, (*Laws of N. Y.* vol. 1. p. 349. 1 *R. L.* 518. 2 *Rev. Stat.* 378.) was bound to assign the breaches, and that the jury are to assess the damages thereon. The judgment for the penalty is merely a security, and the plaintiff is entitled to issue an execution for the damages only, which have been assessed by a jury.

Emott, contra, admitted that the replication was bad; but that the application should have been to set aside all the proceedings, for want of an assignment of breaches, not merely to set aside an execution which, on the face of it, was regular.

**Per Curiam.* The execution is for the whole penalty, which is certainly irregular. It must be set aside with costs.

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Rule granted. (a)

(a) *Vide Allen v. Watson*, 15 *Johns. Rep.* 209.

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ALBANY;
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Executors of
CABLE
v.
LONG.

BAKER and others *against* PHILIPS.

Pledges of prosecution to a declaration are mere form, and may be inserted any time before judgment.

THERE was a special demurrer to the declaration in this cause for want of the pledges of prosecution.

Russel, for the plaintiffs, cited 3 *Term Rep.* 157. 7 *Term Rep.* 576.

Henry, for the defendant.

Per Curiam. The pledges of prosecution are mere matter of form, and may be entered any time before judgment. (*Barnes*, 163.) The plaintiffs must have judgment.

Judgment for the plaintiffs.

RUDD and EVERETT, Executors of CABLE, *against* LONG.

Executors and administrators must pay costs on a judgment of non-pros. (a)

A JUDGMENT of *non-pros* having been entered against the plaintiffs in this cause, it was submitted to the court whether, as executors, they were bound to pay costs.

Per Curiam. It is well settled, that an executor or administrator must pay costs on a judgment of *non-pros*. (3 *Burr.* 1584—1586. *Tidd's K. B. Prac.* 898. 6 *Term Rep.* 654.) It is the default of the plaintiffs, and they ought not to be exempted, in such a case, from the payment of costs.

(a) *Morse, Adm. v. M' Coy*, 4 *Cow. Rep.* 551, and the cases there cited. *Brown, Ex. v. Lambert*, 16 *Johns. Rep.* 148. See *Barnard v. Higden*, *Ex. 1 Chit. Rep.* 623, and the reporter's note.

ALBANY,
Feb. 1909.BAKER
v.
JES OF UL-
STER.BAKER *against* The Judges of Ulster Common Pleas.

SUDAM moved for a rule to show cause why a *mandamus* should not issue to compel the judges and justices of the Court of Common Pleas of *Ulster* county, to vacate a rule granted by them for discharging one *Daniel Ketchum, jun.* from a *ca. sa.*, on the ground that he had been discharged under the insolvent act on the same day that judgment was entered against him.

Per Curiam. As the judgment was contemporaneous with the discharge under the insolvent act, (b) the defendant had no opportunity to plead his discharge. (2 *Caines*, 380. 1 *Johns. Cases*, 133.) He might have sought relief by an *audita querela*; but it is usual to grant the same relief on motion, and the rule of the court below was properly granted. The motion must be denied.

Rule refused.

Where the defendant, in a suit in the common pleas, obtained his discharge under the insolvent act, on the same day that a judgment was rendered against him in that court, and being brought up on a *ca. sa.*, the court discharged him, on motion, this court held the proceeding to be regular. (a) A party entitled to relief by an *audita querela*, may be relieved on motion.

(a) *Palmer v. Hutchins, Mabbotts v. Van Buren*, 1 *Cov. Rep.* 42, 44.(b) 2 *Rev. Stat.* 30, 32, 30.

ALBANY,
Feb. 1909.



Attorney's cer-
tificate of clerk-
ship.

ON the application of A. B. to be admitted as an attorney of this court, a certificate of C. D., one of the attorneys of this court, was produced, which stated, that A. B. had studied in his office, (which was in a different place from that in which the attorney himself resided,) under his direction and advice, and as his clerk. KENT, Ch. J., said, that the certificate was not sufficient; that the clerk must be in the office under the personal direction of the attorney himself; and that the establishment of different offices, in different towns and counties, by the same attorney, was an evasion of the law, and an imposition on the court.

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GENERAL RULES.

Friday, February 17, 1809.

ORDERED, that so much of the rule of *November* term, 1803, as provides that persons who have been admitted to the degree of counsellor at law in any other of the *United States*, and practised as such, for four years, in such state, shall be admitted as counsel in this state, be annulled.

Saturday, February 18, 1809.

ORDERED, that motions in arrest of judgment be hereafter brought on, as belonging to the class of *enumerated* motions, and that they be entitled to a preference to other causes on the calendar.

END OF FEBRUARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN MAY TERM, IN THE THIRTY-THIRD YEAR OF OUR
INDEPENDENCE

COLE, *qui tam*, &c. against SMITH.

THE declaration in this case was as follows :

"City and county of *New-York*, ss. *Jonathan Cole*, plaintiff in this suit, who sues as well, &c. complains against *Edward A. Smith*, being in custody, &c. For that whereas the said defendant, on the first day of *May*, in the year of our Lord, one thousand eight hundred and four, at the city of *New-York*, at the first ward of the said city, and within the county aforesaid, became, and was indebted to the said plaintiff, in a large sum of money, to be paid upon request, to wit, in the sum of five hundred dollars, lawful money of the *United States of America*, for money, by the said defendant, before that time had and received to the use of the said plaintiff, whereby, and by reason whereof, and of the said sum of money being still due and unpaid, an action hath accrued to the said plaintiff, to demand and have of and from the said defendant the said sum of money above demanded ; yet the said defendant, although often requested, hath not paid the said sum of five hundred dollars, above demanded, or any part thereof, to the said plaintiff, but he, to do the like, hath hitherto wholly refused,

Where an action, *qui tam* &c., is brought by a common informer, for treble damages, under the second section of the act "to prevent excessive and deceitful gaming," a declaration in *assumpsit* for so much money had and received to the

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use of the plaintiff, is not sufficient. That form of declaring is given to the losing party only. The statute gives no form of declaring where a common informer is plaintiff,

and in an action founded on a statute, the plaintiff must state specially the cause of action arising under the statute. (*Bartlett v. Crozier*, 17 *Johns. Rep.* 456, and the cases cited. *Collins v. Ragrew*, 16 *Johns. Rep.* 5.)

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and still doth refuse, to the damage of the said plaintiff, of five hundred dollars, and thereof he brings suit," &c. Plea, the general issue.

The cause was tried at the *New-York sittings*, on the 8th April, 1807, before Mr. Justice *Tompkins*. At the trial, the plaintiff's counsel stated, that the suit was brought to recover the sum of five hundred dollars, under the second section of the act, entitled, "An act to prevent excessive and deceitful gaming," (*Rev. Laws of N. Y.* vol. 1. p. 231. sess. 24. c. 46. 1 R. L. 152.) which section is as follows: "And be it further enacted, That every person who shall, at any time or sitting, by playing at any game, or by betting on the sides or hands of such as do play at any game, lose to any one or more persons so playing or betting, in the whole, the sum of twenty-five dollars, in money or in any other thing to such amount, and shall pay or deliver the same, or any part thereof, it shall be lawful for such person within three months next thereafter, to sue for and recover the money or value of the things so lost and paid or delivered, or any part thereof, from the winner, with costs of suit, by action of debt founded on this act, in any court of record having cognizance of the same, in which action it shall be sufficient for the plaintiff to allege in his declaration, that the defendant is indebted to the plaintiff in the moneys so lost and paid, or in the amount of the value of the things so lost and delivered, for so much money had and received by such defendant to the plaintiff's use, without setting forth the special matter: and in case the person who shall lose such money, or other thing as aforesaid, shall not, within the time aforesaid, *bona fide*, and without collusion, sue and prosecute with effect *for the money or other things so by him lost and paid, or delivered, it shall be lawful for any person, by any such action, to sue for and recover the same, and treble the amount or value thereof, with costs of suit against such winner, the one moiety of such forfeiture, when recovered, to be paid to the overseers of the poor of the city or town in which such offence shall be committed, and the other moiety to the person who will sue for the same." (1 *Rev. Stat.* 662.)

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It appeared that different sums of money had been won at play, between the fifteenth day of *May*, one thousand eight hundred and three, and the twelfth day of *February*, one thousand eight hundred and four, by the defendant, of one *F. A.*, who was called as a witness, and testified, that, at different times, between the fifteenth day of *May*, 1803, and the twelfth day of *February*, 1804, the witness lost with the defendant, at gaming, five sums of money, each sum amounting to, at least, twenty-five dollars, but that he could not specify what particular sum he lost at any one time. He was, however, sure, that the sums so lost at each of those five times ex-
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ceeded twenty-five dollars. The present suit was not brought until the twelfth day of May, 1804.

The counsel for the defendant objected, that the plaintiff could not recover ;

1st. Because the evidence did not support the declaration, as no recovery could be had in this action, except for money lost at play by the plaintiff, *Cole* ;

2d. Because no particular sum was specified at any particular losing ; and

3d. If a recovery could be had, it could only be for *treble* the amount of a particular sum lost at one time or sitting.

The judge overruled the objections, and a verdict was taken for the plaintiff for 375 dollars, in order to have the opinion of the court on the points above stated.

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**R. Riker*, for the defendant, now moved to set aside the verdict, and that a nonsuit should be entered. He contended, that the plaintiff could not recover on the declaration. The statute enables a person who loses 25 dollars, or upwards, at gaming, to recover it back, by an action of *indebitatus assumpsit*, for so much money had and received to his use. It then provides, that if the party does not bring his action within three months, that then any other person, as a common informer, may sue for and recover the same, and treble the amount. Where the party himself brings the action, the defendant may know the cause for which it is brought ; but where an action of *assumpsit*, in the common form, is brought by a stranger, it is impossible that the defendant should know the ground of the suit, or come prepared to meet it. It is a general and well settled rule of the common law, that the plaintiff must state his cause of action with convenient certainty, in order that the defendant may not be surprised, but may come prepared to meet it at the trial. The statute being penal, and in derogation of the common law, ought to be construed with the greatest strictness.

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Again, the statute says, that the party shall forfeit the sum lost and treble the amount ; the verdict should have, therefore, been for four times the amount lost, or 500 dollars. In an action on a penal statute, the plaintiff must recover the precise penalty or nothing. (1 *Hen. Black.* 251. *Marshall, arguendo.* 3 *Mod.* 41.)

T. A. Emmet, contra. The act was intended to prevent a great and growing vice, and great latitude, as to the form of action, was given, in order to prevent any difficulties which might arise as to the pleadings. The form of the declaration, in which the plaintiff states, that he sues as well for himself, as for the overseers of the poor of the city of *New-York*, &c.,

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sufficiently apprizes the defendant of the cause of action. Suppose the action brought by a party, who had lost fifty different sums on different days, in gaming with the same person, he might bring one action for the whole, and the defendant would be equally at a loss to know *the precise ground of action. The action need not be debt; for the statute, after saying that the losing party may declare for so much money had and received to his use, declares, that, if no suit is brought by the party in three months, any other person may sue "by any such action," and recover the money lost, and treble the value in damages, thus expressly giving the common informer the same action as that before granted to the losing party.

A stranger, or common informer, who sues for the penalty, is entitled to greater indulgence in pleading, for he may not always know the precise facts; and, if compelled to state the cause of action with perfect certainty, as to time, place, amount, &c., the intention of the act might be defeated. The legislature evidently intended to facilitate the recovery in this case, by giving a simple form of action. The doctrine stated from *M'Quillin v. Cox*, (1 H. Black. 49.) is merely that in action of debt, founded on a record, specialty or statute, giving a certain penalty, the precise sum must be stated. The same strictness will not be required in the present form of action.

Per Curiam. The action of the plaintiff is founded entirely upon the authority of the statute. There was no contract or privity existing between him and the defendant, from which the law would raise an implied *assumpsit* in the defendant to pay money to him. The declaration, containing only a single count for money had and received, could not then have disclosed to the defendant the grounds of the action; and, in legal intendment, the testimony at the trial must have been a complete surprise. An action founded upon a statute must state specially the cause of action arising under the statute. Nothing will prevent the application of this rule but the statute itself giving a particular form of declaration. In the statute respecting gaming, there is no form of declaring given, when a common informer, as the plaintiff is, brings a *qui tam* action for the money lost and the treble damages. He is to have an action of debt founded *on the statute, and further than that is not provided for in this case. The statute is silent as to the mode of declaring in such action; and the plaintiff must consequently follow the general rule of stating the special matter upon which his cause of action arises. The testimony did not support a count for money had and received to the plaintiff's use; and a judgment of nonsuit must be entered.

The statute of 9 Anne, c. 14. s. 2. contains precisely the same provisions as our act. The latter is, in fact, a transcript

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of the former; and when the common informer sues in that case, upon the neglect of the loser to sue within the three months, he states the special matter, and does not declare simply upon the count for money had and received. This appears from the record in the case of *Frederick v. Lookup*, (4 Burr. 2018.) which was an action founded upon the same clause of the statute.

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Judgment of nonsuit.

The PEOPLE, *ex relat.* CORLESS, against ANTHONY.

THIS was a case of a forcible entry and detainer, brought before this court by *certiorari*. From the return to the *certiorari*, the following facts appeared. On the 19th day of September, 1805, at Easton, in Washington county, Corless complained of a forcible detainer by Anthony, of a farm and messuage in Easton, and the justice, having satisfied himself of the truth of the complaint, issued his precept to the sheriff to summon a grand jury to meet on the 21st of September, and on the same day he caused a written notice of the summoning of the inquest to be given to Anthony. The parties met on the day, and the jury appeared and were duly sworn and charged to inquire of the complaint. After hearing the evidence, the jury returned an INQUISITION, under seal, on the same day, stating, that Corless was, on the 18th September, 1805, seised of a farm and messuage, in Easton, for a term of years yet unexpired, and that Anthony forcibly entered and expelled him, and from that day did forcibly keep him out. Anthony pleaded to the inquisition, not guilty. The justice thereupon, on the 23d September, issued a precept to the sheriff to summon a petit jury to meet on the 29th of September, to try the traverse. On that day the parties met, and the sheriff returned the jury, who were sworn, and after hearing the proofs and allegations of the parties, found the defendant guilty. The justice thereupon adjudged that restitution be made, and that the defendant should pay to the plaintiff for his damages, 24 dollars.

This case was submitted without argument.

KENT, Ch. J., delivered the opinion of the court. 1. The first objection to this proceeding is, that it does not appear that the justice, after the complaint made, went to view,

Where a justice proceeds under the third section of the "act to prevent forcible entries and detainers," it is not necessary that the justice should previously go in

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A fine is required to be imposed against the party, in a case of forcible entry and detainer, only where there is a conviction upon view, according to the first section of the act.

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or that he recorded, the force. The record states, that the justice, "having first satisfied himself of the truth of the complaint," did issue his precept. The act says, (11th sess. c. 6. s. 2.) that the justice, after complaint, shall, "within a convenient time, go to the place and remove the force, and take the power of the county with him, if need be, and shall have authority to inquire by the people of the county, and shall cause the lands to be resealed," &c. These directions are in the second section of the act, and seem to apply to a summary remedy by the act of the justice alone. But the third section of the act contains the provisions under which modern proceedings by indictment are generally conducted. This section supersedes the necessity of the justice previously going in person to view and record the force. Both proceedings cannot be necessary at the same time, and though the third section says, that "when the justice makes such inquiries," he shall issue his precept, this is not to be construed as imperative upon him to have a previous view and record of the force, so as to render the proceedings erroneous without such previous view. The statute requires a more reasonable interpretation; and the reason why the statute appears to contain provisions apparently inconsistent with each other, or superfluous, is, that the statutes of the 5 R. II. the 15 R. II. the 8 H. VI. and the 31 Eliz. on this subject, are all literally copied, in succession, into our statute, though the latter *English* statutes enlarged and improved upon the more imperfect remedy given by the two first statutes. The third section of our statute is taken from that of 8 H. VI. and it must be construed as affording a distinct and more specific remedy than that contained in the former sections. (a)

2. A second objection taken is, that the indictment does not show before whom it was found. But this objection does not appear to be true, in point of fact. The record states, that *Henry Van Schaick*, one of the justices of the peace in and for the county of *Washington*, issued his precept for the grand jury; that the sheriff of the county of *Washington* summoned and returned the panel of the same to the justice; that the jurors were

(a) See 2 Rev. Stat. 507, Title X. "Summary proceedings to recover the possession of land in certain cases." The 12th sect. of Article 1st, "Of forcible entries and detainer," provides, that "the verdict of such jury shall be received and recorded by the said judge, and if the defendant is thereby found guilty, the said judge shall thereupon award restitution of the premises so forcibly entered or forcibly held out, and shall assess the costs and expenses of the proceedings;" and the 13th sect. provides, that the said judge "shall thereupon issue his precept, reciting the proceedings before him, and commanding the sheriff of the county, or any constable thereof, to cause the complainant to be restored and put into full possession of the said premises, according as he was seised or possessed thereof before such entry; and shall also, in the same precept, or in separate execution, direct the costs and expenses so assessed to be levied and collected of the defendant, in the same manner as costs are or may be collected on judgments before justices of the peace in personal actions."

called, tried, approved of, and sworn by the justice, and by him duly charged to inquire respecting the complaint; that the jurors heard the evidence touching the same, and then, on the same day and place, delivered to him, the said justice, their inquisition. This is, therefore, to all intents and purposes, a sufficient caption to the indictment, for it states every thing which ought to precede an indictment, to show that it was taken before a magistrate having jurisdiction in the case.

3. The next objection is, that there was no legal traverse, because it is not shown to have been in writing. The record states, that "the indictment being read to the defendant by the justice, he pleaded thereto, that he was not *guilty of the premises in the said indictment by the said jurors found." The words of the statute are, "that if any person who shall be indicted upon this act before such justice, shall immediately traverse such indictment, then the justice shall make a precept," &c. There is nothing in the statute requiring this traverse of the force to be in writing; and though *Hawkins* says, (b. 1. c. 64. s. 58.) that it must be done in writing, and not by a bare denial of the force by parol, yet none of the authorities to which he refers, appear to support this position, and it is against all the rules of pleading in criminal cases. Whether the traverse in the present case was or was not in writing, does not appear by the record; and if it really were necessary that it should be in writing, I should contend from this record that it was so, for it was received and acted upon as a competent plea. But the defendant below having put in this plea, and acted upon it, he cannot now be permitted to come here, and allege that his own plea was bad. This, of itself, is a decisive answer to the objection.

4. Another objection is, that the conviction is not warranted by the indictment, as the latter is for a forcible entry and detainer, and the former of a detainer only.

There is no weight in this objection. On an indictment for a forcible entry and detainer, the *petit* jury may find the defendant guilty of the detainer only, for a writ of restitution will equally go, as if the conviction had reached to the whole indictment, and the assessment of the damages will be in proportion to the degree of guilt or injury. On an indictment for grand larceny, the defendant may be found guilty of *petit* larceny only, or on an indictment for robbery or burglary, he may be found guilty of simple larceny, and on an indictment for murder, the verdict may be for manslaughter, and these several convictions will be good. The same reason applies to the present case.

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5. The last objection which I shall notice is, that the justice ought to have set a fine upon view of the force. The record states, that after the verdict and award of restitution, *the justice did "adjudge, that the said *Anthony* pay to the said *Corless*, for his damages which he had sustained in the premises, 24 dollars." The statute says, that the party convicted upon the traverse, "shall pay such costs and damages to the party complaining, as shall be assessed by the justice before whom the same is tried." It appears, then, that the assessment in this case was strictly in conformity with the statute. The fine spoken of in the books, is when the justice convicts one of a forcible detainer upon view, according to the provision in the first section of the statute; but in a proceeding by indictment and traverse, under the third section, as this was, the assessment, as in the present case, must be correct.

Having thus examined all the material objections raised to the proceedings and conviction, the opinion of the court is, that the conviction be affirmed, and if restitution has not already been had, that the same be awarded out of this court, with process of execution for the damages assessed, together with the costs in this court, to be taxed against *Anthony*.

Conviction affirmed.

JACKSON, *ex dem.* DUNCAN and others, against HARDER.

A person who
had been in
possession of
land for 8 or 10

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years, under
color of title,
was held entit-
led to recover
in ejectment
against a mere
intruder or tres-
passer.

A mere in-
truder will not
be allowed to protect himself in the possession, by setting up an outstanding title in a stranger. (a)

An outstanding title in a stranger cannot be set up where there has been an adverse possession of 20 years. A claim or title, which could not be set up by a person while in possession, cannot be set up by another person, who comes into possession under him. (b)

A parol partition of land, carried into effect by possession taken by each party of his respective share, according to the partition, will be valid and binding on the parties. (c)

(a) *Jackson v. Rowland*, 6 *Wend. Rep.* 671. *Jackson v. Schaubert*, 7 *Cow. Rep.* 187. 7 *Cow. Rep.* 643.

(b) *Jackson v. Wyckoff et al.* 5 *Wend. Rep.* 53.

(c) See *Jackson v. Ayers*, 14 *Johns. Rep.* 294, and the cases in note (a.)

and *Campbell*, two of the lessors, came into possession, when he became their tenant. After he went away, *William Cochran* came into possession under *Duncan* and *Campbell*, and remained there several years. *Alexander Patterson* took possession afterwards under *Duncan* and *Campbell*. *Jacob Elias* came on the premises in 1779, under *Duncan* and *Campbell*, by lease for a year, and continued thereon until his death; and his family still live there. In 1776, the father of the witness and *M' Comb* divided the north part of the patent, down to a certain white-ash tree, and then running east to the east bounds of the patent. The north part was held by his father, and is now held by the witness. The south part fell to *M' Comb*, about the year 1779 or 1780. After *Jacob Elias* was upon the premises, *Samuel Howe* and *Jonathan Baker* came in possession; *Elias*, *Howe*, and *Baker* had possession, and built houses upon the tract, claiming title, and saying they had purchased of *Duncan* and *Campbell*. *Baker* built on the south-east part of the tract claimed by *D.* and *C.* and near the place called *Stoney Dock*. *Elias* built on the north-east part of the tract, where his family now are, and at the place where *Mantle*, *Cochran*, and *Patterson* formerly resided. *Samuel Howe* built near the east line of the tract where *Jonathan Fish* afterwards lived, upon a farm now owned and possessed by the defendant, but not the premises now in dispute. The witness was present when *Baker*, *Howe*, and *Elias* agreed upon a division of the land bought of *Duncan* and *C.*, and the plan was marked out upon the barn. A survey was afterwards made agreeably thereto. The parties, afterwards, possessed, and built, in severalty, according to that division, which took place in the spring of 1783. *Upon that division, there was a small piece of about two acres at the north-east corner of *Baker's* former possession, which fell to *Howe*, and has always been held with the portion allotted to *Howe*. *Baker* went away, about the year 1787 or 1788, and one *Rundles* succeeded to the possession, and after him, the defendant. The witness pointed out, on a diagram, the manner of the division between *Howe*, *Elias*, and *Baker*, by which it appeared, that *Elias* took one half of *Duncan* and *Campbell's* tract, and one third of the remaining half. That *Elias* took his half upon the north, and his third of the remaining half upon the south-east corner. *Howe* took his part, lying upon the east, and bounded upon the north and south sides by *Elias*, and extending about half the distance from the east side to the river. *Baker* took his share at the south-west corner. The witness, on his cross-examination, said, that *Casper Salisbury*, as far back as he could remember, lived within the tract claimed by *Duncan* and *C.* and held under the *Salisbury* claim and against them; his old farm extended as far as *Stoney Dock*, and the lands lying south of the line, which runs east from *Stoney Dock*, were possessed under

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the *Salisbury* claim. One *Delamatter* held east of *Casper Salisbury*, and the widow *Moore* east of him. That *Duncan* and *Campbell*, or *M' Comb*, never had any lands in possession south of the east line from *Stoney Dock*.

Alexander Patterson, another witness for the plaintiff, testified, that he had lived on the *M' Comb* tract. That he went on under *Duncan* and *Campbell*, in 1775. *Wynant Mantle* lived there under *M' Comb*, in 1764. *Elias* succeeded the witness in the possession. A son of *Casper Salisbury* had a field south of him, and *Casper Salisbury* had a field still farther south, which the witness, afterwards, held under *William Ludlow*. This was in 1774, and the witness then lived with his father-in-law. In 1763, 1764, or 1765, he had some grain on a field which, afterwards, came into the possession of *Baker*. The fence was gone, and the land then vacant. *Cochran* was in possession before he came *on, and *Cochran* held under *Duncan*. The son of *Casper Salisbury* held some land for one year under *Cochran*. The land held by *Casper Salisbury* was meadow land, and the witness, afterwards, occupied it under *Ludlow*. When *Salisbury* moved away, the land was turned into common, and *Ludlow* got a judgment against the possession, which he sold at auction, and bid off himself. *Ludlow* said he would hold the land as long as he could, and offered it to the witness for a pair of horses. The witness continued in possession until the late war, when he left it, and then *Ludlow* sold the land to *Baker*. There was some land north of *Casper Salisbury's* possession, which, on the division between *Howe*, *Elias*, and *Baker*, fell to *Baker*. Part of *Casper Salisbury's* possession extended near to *Stoney Dock*, and he claimed no more than he had enclosed, and *Ludlow* claimed all that *Salisbury* had enclosed. *Salisbury* had all his possession south of the road, and it lay on both sides of the south line of *M' Comb's* tract. *Baker's* house and barn were no part of *Salisbury's* possession. The greater part of *Salisbury's* possession lay north of *M' Comb's* south line, as laid out on the diagram.

Samuel Howe, another witness for the plaintiff, was objected to as interested, but was admitted. He testified, that *M' Comb's* and *Campbell's* tract extended from *Coventry's* down to an ash tree upon the river. He proved the division between *Baker*, *Elias*, and him, as above-mentioned. They possessed severally according to the division. *Baker* and *Elias* were in possession before the agreement for a division. *Baker* first lived at the south-west corner of the tract, and built near the same place, east of *Stoney Dock*, and north of the road leading to the river. They agreed that each should have an equal share of *Duncan's* right. In 1783, they chalked out the division, and agreed to have it surveyed, and it was done by *David Cully*. *Elias* took *Campbell's* half, and the residue was equally divided

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among the three. Each party agreed to hold according to the survey. The witness sold to *Jonathan Fish*, and the defendant *got the land from him, and now holds it as his own. In the survey, (the lines of which *Baker* afterwards retraced and agreed to,) the line extended *down to the ash tree* upon the river, and then east; and that line east from the ash tree, was the southern line agreed on by the occupants of *Duncan* and *Campbell's* tract. About 60 acres of *C. Salisbury's* possession were part of the land divided between them, and purchased from *Duncan*. *Baker* purchased the possession of *Ludlow*, in 1781. *Ludlow* told the witness that he did not pretend to any thing more than a bare possession; and this was after the agreement with *Duncan* and *Campbell*. *Ludlow* also said, that the fee of the land was in *Duncan* and *Campbell*.

The testimony relative to *Ludlow's* confessions about the title was objected to by the counsel for the defendant, but the objection was overruled.

The lot purchased from *Ludlow* was taken by *Baker* as part of his share of the tract purchased from *Duncan* and *Campbell*. *Delamatter's* land lay east of *Salisbury's*, and north of the south line of *M^cComb*. *Elias* was, by agreement, to buy in *Delamatter's* claim, and the witness and *Baker* were to buy off *Ludlow's*. On the division of the purchase, it was not considered that *Baker* had any greater right than the witness and *Elias*; neither did *Baker*, on account of the purchase from *Ludlow*, claim any more land than *Elias* and the witness. *Baker* moved away in 1787 or 1788, and he told the witness before he moved, that he owed, and could not pay *Duncan*, and that he must quit the land. The defendant is now in possession of this land. The parties agreed to *Cully's* map and division, and the possessions are now held agreeable to the division of 1783. The witness paid a part of the consideration money to *Ludlow*, and on the division, one and a half, or two acres, of *Salisbury's* possession fell to him, and he took possession of it the day after *Cully's* survey. When *Baker* bought of *Ludlow*, there was a dispute about the land, and *Ludlow* said that he had bought *Salisbury's* possession. One *Rakemire* *lived on *Salisbury's* possession, when the witness first knew it, as tenant of *Ludlow*, and some part of that possession then appeared old. Whatever claim *Salisbury* had, *Ludlow* pretended to have. *Ludlow* said that *Salisbury's* possession belonged to the *Duncan* and *Campbell* tract. *Elias* died two or three years after the division, but he never got (as the witness knew) the south-east third of the south half, which is possessed by *Delamatter* and *Whitlock*. The witness paid *Baker* his portion of what he paid *Ludlow*. *Duncan* and *Campbell* each owned half of the tract sold to the witness.

The plaintiff then gave the following evidence of title.

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1. A deed from *Daniel Campbell* to *Jacob Elias*, for an undivided half of the *M^cComb* tract, dated 24th April, 1784; this deed recited, that the sheriff sold, at auction, a tract of land granted by patent to *Van Salisbury* and *Slytinghurst*, containing 1000 morgan; that *John M^cComb* possessed and claimed one fourth of the tract; that *Duncan* and *Campbell* purchased, at the auction, the share of *M^cComb*, and took a deed, and the covenants are against the grantor only.

2. A deed from *John Duncan* to *Jacob Elias*, for one third of one half, dated 11th October, 1785. It stated, that the land so purchased by *D.* and *C.* was then possessed, in part, by *Jacob Elias*, *Samuel Howe*, and *Jonathan Baker*.

3. A like deed from *Duncan* to *Howe*, dated 4th October, 1785.

4. A deed from the sheriff of *Albany*, to *Duncan* and *Campbell*, dated 11th June, 1770, of all the right of *M^cComb* in the patent, being one half thereof. This deed was objected to, because there was neither judgment or execution to support it; but the objection was overruled.

The plaintiff then proved the death of *John Duncan*, and that the lessors were his heirs.

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The defendant proved that, of the two patentees, *Salisbury* survived, and died, leaving *Hendrick Salisbury* his *heir at law. He then produced a deed from *Hendrick*, dated 18th July, 1737, for the lands lying south of an east line from *Stoney Dock*, to *Herman Salisbury*, his son, for the consideration of love and affection. He then proved, that *Casper Salisbury* was a son of *Herman*; and offered to prove, that *Herman* entered about the date of the deed under it, and lived and died on the premises, claiming and possessing to the line running east from *Stoney Dock*, and that *Casper* was his heir at law, and on his death succeeded to the estate under the same title, and held it under that title, until *Ludlow* got possession in 1784, under a judgment and execution. This testimony was objected to, and overruled.

A verdict was taken for the plaintiff, by direction of the judge, for one sixth of the premises, with leave to enter judgment for the whole, or any part greater than a sixth, which, in the opinion of the court, the plaintiff should be entitled to recover, on the facts in the case, as above stated.

The cause was argued, at the last August term, by *Van Vechten*, for the plaintiff, and *E. Williams*, for the defendant.

KENT, Ch. J., now delivered the opinion of the court.

This case presents an intricate mass of facts and minute circumstances, which it becomes necessary to analyze and digest, with care and patience, before we can discover the just inferences which flow from them.

John M Comb was in possession of a tract of land in *Salisbury* and *Slytinghurst's* patent, adjoining the premises, as early as the year 1764. He continued in possession until the year 1770, when *Duncan* and *Campbell* purchased, at auction, of the then sheriff of *Albany*, the right of *M Comb* in the patent, and which was stated in the sheriff's deed to be one half of it. They probably took possession immediately, and peaceably, with the consent of *M Comb*, for we find them in possession in 1774, and the former tenant *of *M Comb* continued in possession under him, until they came into possession, and then he became their tenant. In 1776, *Coventry* and *M Comb* made a division of the north part of the patent down to a certain white-ash tree, and running east from thence to the east bounds of the patent. Upon this division, the south part fell to *M Comb*, and the north part to *Coventry*, under whom it is still held. This partition must have been made by *M Comb*, for and on account of *Duncan* and *Campbell*, for they were then in possession, under a title purporting to be derived from *M Comb*, and they continued to possess under that division, and thereby ratified the same on their part. This division was so made as to include the premises in question, and to throw the same into the share of the tract which fell to *Duncan* and *Campbell*. Before this time, also, *Casper Salisbury* must have left that part of the premises which he had before held adversely. The precise time when he quitted the premises does not appear; but, according to *Patterson's* testimony, it must have been before the war, and when he went away, the land was turned into common. This division, in 1776, was the first act of actual ownership which appears to have been asserted and exercised by *Duncan* and *Campbell*, over the premises in dispute, and there is good reason to infer, that from that time forward the premises were in their possession. In 1779 or 1780, *Baker* came on to the tract under *Duncan* and *Campbell*, and he went immediately on the south-west corner of the tract where the premises are situated. After he had come into possession under *D. and C.*, he purchased *Ludlow's* claim to the premises, and which claim was founded on a purchase, at the sheriff's sale, of *Salisbury's* possession. *Ludlow* never pretended any right to the premises, though he admitted that he was possessed of all the claim of *Salisbury*. He said that the land belonged to the *Duncan* and *Campbell* tract, and that the fee was in them, and that he did not pretend to any thing more than a mere possession. This he told to *Baker*, who must have considered his claim as *being no better, for he continued to hold his possession under *D. and C.*, and never pretended to any right adverse to theirs. The purchase of *Ludlow's* claim was made in pursuance of an agreement between the three tenants, viz. *Elias*, *Howe*, and *Baker*, for their common bene-

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fit, and merely to quiet their possession. *Baker* never pretended that he had acquired any superior right to his co-tenants, and the facts authorize us to conclude, that the purchase-money was paid equally by all of them. This purchase was made before any partition between the three co-tenants, and while it was understood and agreed that each should have an equal share of *Duncan's* right. The division made in 1783, between *Howe*, *Elias*, and *Baker*, is conclusive evidence of this understanding between the parties, and of the intentions of *Baker*. That division was avowedly made by them of the lands which they had, or alleged to have, purchased of *D.* and *C.*, and the survey by *Cully*, which ran down to the white-ash tree, was made by their direction and in pursuance of that division, and possessions were afterwards taken by them accordingly. *Baker* took the premises as his share upon that division, and he traced on the land, the lines of *Cully's* survey, and agreed to them. *Baker* continued to occupy this land under the title of *D.* and *C.*, until the year 1787 or 1788, when he quitted the premises, and expressly declared the reason to be, that he was not able to pay *Duncan* for the land, according to his contract.

Upon these facts, I think it results, that the plaintiff showed enough, in the first instance, to entitle him to recover. He showed a possession of eight or ten years, under a claim and color of title. It is clear, beyond all doubt, that *Baker*, who entered and held under the plaintiff, would be concluded from setting up any adverse title, and any person who succeeded to the possession under *Baker* would be equally concluded. In what way the defendant succeeded to the possession, does not appear. It is not stated or alleged, that he entered under any pretence or color of title, and the natural and just inference seems to be, that he entered *upon the possession which *Baker* had left, as an intruder without title. In that case, the possession of the plaintiff was sufficient to entitle him to recover, and the entry of the defendant must be considered as a trespass, according to the decision, in the case of *Jackson, ex dem. Murray and Bowen, v. Hazen*, (2 *Johns. Rep.* 22.) The defendant is either such an intruder, or he entered under *Baker*; and in either case, he is precluded from questioning the plaintiff's right of possession. *Baker* entered, and held for years under *D.* and *C.*, and they and their heirs are entitled, as against him, and as against all persons who came in under him, or who entered as intruders upon a possession

which he left, to place themselves in *statu quo*, by regaining the actual possession which they had parted with to *Baker*, upon the faith of a contract. This is a settled rule of law, and founded in manifest justice.

But the defendant set up and offered to show an outstanding title subsisting in some third person; for he offered to prove, that *Casper Salisbury*, as heir to his father *Herman*, held a farm which included the premises, "until *Ludlow* got possession in 1784, under his judgment and execution." The first question which presents itself here is, whether a mere intruder can be permitted to protect his intrusion under an outstanding title in a stranger. I think not. The rule has never been carried so far, and it would be a violation of just principle to apply it to the case of a trespasser who enters upon another's possession without pretence of title. But, if the defendant could be permitted to set up this defence, the next inquiry is, whether what he offered to show was a subsisting title. It was upwards of twenty years between the time that *Ludlow* is stated to have acquired the *Salisbury* title, under a judgment and execution, and the time of trial when the testimony was offered, and I believe the rule is, that where upwards of twenty years of adverse possession have run against an outstanding title, it shall not be set up. (*Buller's N. P.* 110. 3 *Johns. Rep.* 386.) The presumption in that case is, that it is no longer *a subsisting title*. And this presumption was confirmed by the evidence which the plaintiff had already given in the case respecting the declarations of *Ludlow*. The title set up by the defendant, according to the testimony which he offered, resided in *Ludlow*, under a judgment and execution; and the plaintiff had shown that *Baker* purchased that title of *Ludlow*, and that, if it existed any where, it existed in him. This brings us, then, to this point of inquiry, whether a claim or title residing in *Baker*, and which he could not have set up while he was in possession, can be permitted to be set up by another person who succeeds *Baker* to the possession, and probably by collusion with him. I am clearly of opinion, that this ought not to be permitted, and that it would be inconsistent to permit the defendant to protect himself by a claim or title in *Baker*, which *Baker* himself could not have set up, had he remained in possession. The necessity of guarding against fraud and collusion between tenants and third persons, requires the observance of this rule. I am, accordingly, of opinion, that, in every view of the case which I can take, the defence offered by the defendant was inadmissible, and properly excluded.

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The validity of the two partitions is not to be questioned. It did not require leases to make the division valid. A parcel division, carried into effect by possessions taken according to it, will be sufficient to sever the possessions, as between tenants in common whose titles are distinct, and when the only object of the division is to ascertain the separate possessions of each. This was so admitted by the court in the case of *Jackson, ex dem. Vandenberg, v. Bradt*. (2 *Caines*, 174.) Those divisions being binding upon the parties, there did not then exist any objection to the competency of *Howe* as a witness. And as to the declarations of *Ludlow*, they became material only, in consequence of the defence set up by the defendant, and they then went to show, that the title referred to, was not regarded by the claimant as valid. Those declarations were made material only by the act of the defendant. When they were introduced by the plaintiff, they were immaterial, for they went only to support a fact which appeared sufficiently without them, viz. that *Baker* never considered himself as deriving any title under *Ludlow*, paramount to that which he derived under *Duncan* and *Campbell*, and that his purchase from *Ludlow* never affected the dependent relation in which he stood to *Duncan* and *Campbell*.

The court are, therefore, of opinion, that the motion, on the part of the defendant, for a new trial, must be denied.

Rule refused.

VAN BENTHUYSEN and another *against* DE WITT and others.

In suits on bonds for the performance of covenants, it is compulsory on the plaintiff to assign breaches and have his damages assessed; and if no damages are assessed on the breaches assigned, it will be error.

THIS case came before the court, on the return to a writ of error, from the Common Pleas of *Dutchess* county.

The suit below was on a bond given by the plaintiffs in error, to the defendants, as overseers of the poor of *Rhynebeck*, to indemnify the town against the maintenance of a bastard child.

The defendants below pleaded,

1. *Non est factum*, and
2. Performance of the condition.

The plaintiffs replied, setting forth a breach, and issue was joined thereon. The verdict was taken upon the first issue only, by which the jury found that the bond was the deed of

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the defendants, and they assessed damages, by reason of the detention of the debt, to 1 cent, besides the costs and charges to 6 cents. A judgment was given thereon for the debt and costs.

*The case was submitted to the court without argument. The question was, whether it is not error to enter a judgment for the debt, before the jury have passed upon the second issue, and if found in favor of the plaintiff, until they shall have assessed damages for the breach assigned.

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Per Curiam. In suits on bonds for the performance of covenants, it is compulsory on the plaintiff to assign breaches, and have his damages assessed. (2 *Caines*, 329.) And when breaches are assigned, the jury at the trial must assess damages for such breaches as the plaintiff shall prove to have been broken, otherwise the verdict is erroneous, and a *venire de novo* will be awarded. This was so held in the case of *Drage v. Brand*, (2 *Wils.* 377.) where the jury having found that the defendant owed the debt, and having omitted to assess damages for the breach assigned, a *venire de novo* was awarded. In *Hardy v. Bern*, (5 *Term Rep.* 636.) error was brought into the exchequer chamber upon the judgment, because, as the breaches were denied by the defendant, and issue joined thereon, the jury had found the issues for the plaintiffs, and had given only damages for the detention of the debt, and had not assessed damages for the breaches. And upon the opinion of Lord *Kenyon*, and of Mr. Justice *Buller*, that the damages must be assessed, the judgment was reversed, and a *venire de novo* awarded. (α)

(α) When an action is prosecuted in any court of law upon a bond for the breach of any condition, other than for the payment of money, or for any penal sum for the non-performance of any covenant, or written agreement, the practice under the *Revised Statutes* is, for the plaintiff to assign, in his declaration, the specific breaches for which the action is brought; and for the jury, upon the trial, if they find that any assignment of such breaches is true, and that the plaintiff shall recover damages therefor, to assess such damages, and specify the amount thereof in their verdict.

When judgment in such actions is obtained upon demurrer, confession or default, the plaintiff may either issue a writ of inquiry to the sheriff, to inquire into the truth of the breaches assigned, and to assess the damages, or make up a circuit roll of the proceedings, and enter an order therein, that the truth of the breaches assigned be inquired into, and the damages sustained thereby assessed at the next Circuit Court. If the plaintiff recover, the verdict is entered on the record, and judgment rendered for the penalty of the bond, or for the penal sum forfeited, as in other actions of debt, together with the costs of suit; and a further judgment that the plaintiff have execution to collect the amount of the damages so assessed by the jury. The damages are specified in the judgment, and the execution is in the usual form in actions of debt.

When the amount of the damages so assessed shall be satisfied, the real and personal estate, and the body of the defendant, will be discharged from further liability for the damages so assessed; but the judgment will remain as a security for any damages which may afterwards be sustained by the further breach of any condition of such bond, or by the non-performance of any other covenant,

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In the present case, there is this further defect, that the jury have not passed at all upon the second issue.

We are, accordingly, of opinion, that the judgment below must be reversed, and that a *venire de novo* be awarded, at the election of the defendants in error, returnable at the *Dutchess* circuit.

Judgment below reversed. (a)

or written agreement by the defendant, the performance of which was secured by such penal sum. When further breaches occur, the plaintiff, or his legal representatives, may have a writ of *scire facias* upon such judgment, suggesting such breaches against the defendant and all parties bound thereby; and the like proceedings to ascertain the damages sustained by such further breaches may be had, as were pursued in the first instance, and the judgment, in like manner, remains as a security for any further breaches. 2 *Rev. Stat.* 378.

(a) See *ante*, p. 189.

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FULLER.*JACKSON, *ex dem.* FERRIS, against FULLER.

THIS was an action of ejectment, upon a mortgage, executed on the 1st May, 1807, by *Andrew Wilson*, junior, to the lessor of the plaintiff. It was admitted that the mortgage debt was due and unpaid, and that the defendant was in possession, without the privity or consent of the plaintiff. *Wilson*, the mortgagor, in February or March, 1808, conveyed the premises, in fee, to one *Daniel Wilson*, subject to the mortgage. In April last, the interest of the mortgagor was sold on execution, at public auction, to *Daniel Wilson*, who was the highest bidder, and on the 1st of May last, he leased the premises for one year to the defendant. The case was submitted to the court without argument.

The question was, whether the defendant was entitled to notice to quit.

Per Curiam. The case of *Jackson, ex dem. Benton, v. Laughhead*, (2 Johns. Rep. 75.) in which the court decided that a mortgagor was entitled to notice to quit, arose between the original mortgagor and mortgagee. There was a privity of contract, as well as of estate, existing in that case; and the reason of the rule requiring notice, is much weakened, when it is to be applied to the case of a purchaser in fee under the mortgage. All privity between the parties is now gone. The purchaser is a stranger to the contract by which the mortgage was created. He cannot be considered in the light of a tenant. He knows nothing of the original debt, and is under no personal obligation to pay it. He holds possession of the pledge, but not, as in the other case, "by a perfect understanding between him and the mortgagee." He claims exclusively by a title from the mortgagor; and his case is very analogous to that of *Jackson, ex dem. Simmons, v. Chase*, (2 Johns. Rep. 84.) decided in the same term with the former, in which it was held, that notice was not necessary, because the privity of *landlord and tenant could not be said to exist between the mortgagee and a purchaser from the mortgagor. If notice be required in this case, it must be so in every case of ejectment upon a mortgage, even though the land has been conveyed in fee, from hand to hand, until all knowledge of any existing encumbrance is totally lost. This might, indeed, be a convenient rule for a purchaser of land charged with a dormant mortgage, but we must then adopt some other principle than that which governed in the case of

In an action of ejectment brought by a mortgagee against a purchaser of the interest of the mortgagor, or against a third person, between whom and the mortgagee there is no privity of contract or estate, a previous notice to quit is not necessary (a)

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(a) See *M'Kircher v. Hawley*, 16 Johns. Rep. 229. *Jackson v. Aldrich*, 13 Johns. Rep. 108.

NEW-YORK, *Jackson v. Laughhead*, of a privity of contract, between the parties. There must be judgment for the plaintiff.

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Judgment for the plaintiff. (a)

(a) Where a lease is made for a year, and so from year to year as long as both parties please, there must be notice to quit in due time before the end of the year. So where a lease is made to hold during the pleasure of the lessor, there must be due notice to quit; because it would be unreasonable that a man who has gone to the expense of cultivating land, and making preparation for a crop, while his estate was uncertain, should be turned off at a moment's warning. *Bedford v. M'Elheron*, 2 *Serg. & Rawle*, 49. *Mackey v. Mackey*, 1 *Penn. N.J. Rep.* 420. See *Rising v. Stanard*, 17 *Mass. Rep.* 232. *Ellis v. Paige*, 1 *Pick. Rep.* 43. The relation of landlord and tenant, however, must exist, or the party in possession of land is not entitled to notice to quit. *Jackson v. Cuerden*, 2 *Johns. Ca.* 353. *Jackson v. Tyler*, 2 *Johns. Rep.* 444. Therefore, where A. purchased the interest of B. in a lease, and agreed to pay the rent in arrear, and that which was to grow due, to the landlord, it was held that the relation of landlord and tenant did not subsist between A. and B., and, therefore, A. was not entitled to notice to quit. *Jackson v. Kingsley*, 17 *Johns. Rep.* 158. But where, by agreement, a farm was sold by A. to B., and B., upon the payment of a certain sum, was to be entitled to a deed, and in the mean time was put into possession, and was to pay an annual rent, and actually did pay rent for one year, it was decided, that he was entitled to notice to quit. *Jackson v. Niven*, 10 *Johns. Rep.* 335.

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DUBOIS.JACKSON, *ex dem.* TUTHILL, *against* DUBOIS.

THIS was an action of ejectment. The cause was tried at the *Ulster* circuit, before Mr. Justice *Van Ness*, on the 3d October, 1808.

The lessor of the plaintiff claimed title to the premises in question under a purchase made at a sheriff's sale.

At the trial, an *alias fieri facias* was produced, issued out of the *Ulster* Common Pleas, tested the 20th September, 1806, and returnable the first Tuesday of January, 1807, directed to the sheriff of *Ulster*, and in the usual form, for the sum of 75 dollars debt, and 24 dollars 64 cents damages, *against *Tunis Sammons*. Under this execution, the sheriff sold all the right and title of *Tunis Sammons*, to the premises in question, for 204 dollars, to the plaintiff, and executed a deed to him, which was produced. *Cornelius Low* and *Thomas Harris* were both present at the sale, and *Harris* bid twice. *Harris* did not mention that he had any claim to the property, nor did he forbid the sale. A copy of the judgment on which the execution was issued, was produced, bearing date in July, 1801. The premises were devised to *Tunis Sammons* by his father.

The defendant produced a bond and mortgage executed by *Tunis Sammons* to *Thomas Harris*, for the premises in question, for securing the payment of 84*l.* dated the 21st March, 1800, and registered the 17th April, 1802.

It appeared, that, in the summer of 1803, *Sammons* and *Harris* made a settlement of their accounts together, in which the money due on the bond and mortgage was included, and a balance of about 400 dollars was found due to *Harris*, who took a lease of the premises from *Sammons*, for ten years, to pay that sum; and that an endorsement was to be made on the bond, at the end of every year, of the sum agreed on. The bond and mortgage were understood to be in force.

The defendant produced a lease from *Harris* to him, dated the 23th March, 1805; and the lease from *Sammons* to *Harris*, dated the 26th July, 1803, was also produced, under a notice given for that purpose.

On this evidence, the judge directed the plaintiff to be called, and nonsuited, with leave to move the court to set the nonsuit aside, and grant a new trial.

the registry of the mortgage was notice to all the world, and that the interest of the mortgagee was not affected by his silence, or bidding at the sale, nor could it be defeated by the sale, under the judgment, subsequent to the registry.

(a) *Jackson v. Post*, 9 *Cow. Rep.* 120, and the cases cited. 4 *Cow. Rep.* 278, 605. *Jackson v. Terry*, 13 *Johns. Rep.* 471.

Though the interest of a mortgagee can not be sold in execution, yet he may maintain an action of ejectment against the mortgagor, and those who claim under him.

A mortgage
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not registered, has a preference over a subsequent judgment docketed. But if the land should be sold by the sheriff under the judgment, prior to the registry of the mortgage, a *bona fide* purchaser at the sheriff's sale would be protected against the mortgage.

(a) Where A. mortgaged his land in 1800, and a judgment was obtained against him, and docketed in 1801, and the mortgage was afterwards registered in 1802, and, the land having been seized under an execution issued on the judgment, the mortgagee attended at the sheriff's sales, in 1806, and bid, without mentioning the mortgage, it was held, that

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A motion was made to set aside the nonsuit, on the following grounds:

1. As the mortgage was not registered at the time the judgment was docketed, it must be postponed, and the judgment first satisfied.
2. That *Harris*, by taking possession of the premises for the first time in *July*, 1803, and then as a tenant under **Sammons*, was estopped from claiming the possession as mortgagee.
3. That as *Harris* was present at the sheriff's sale, and was silent concerning his claim as mortgagee, he is estopped from now setting up the mortgage.

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Hawkins and *Fisk*, for the plaintiff. 1. The plaintiff, as purchaser at the sheriff's sale, comes in under the judgment, and acquires all the interest which was bound by that judgment. His title refers back to the time of the judgment. (1 *Johns. Cas.* 85. *Jackson d. Loan Officers of Rensselaer v. Bull.*) The statute concerning mortgages (24 sess. c. 156. *L.* vol. 1. 480. sess. 36. c. 32. s. 2. 1 *R. L.* 373.) declares that the mortgage first registered shall have a preference, and that a mortgage not registered shall not defeat the title or interest of a *bona fide* purchaser. A judgment creditor ought to be considered and treated as a *bona fide* purchaser. His *lien* is perfect. The title of the mortgagee, until the registry, is imperfect. The law gives the *lien* to the judgment creditor, and if, at the time it is created, it has a priority to any other incumbrance, that priority ought not to be defeated by any subsequent acts. If the sale of the premises, under the judgment, had been made prior to the registry of the mortgage, there is no doubt that the purchaser would have acquired a valid title. If the mortgage had been registered at the time, the judgment creditor, knowing the existing of the mortgage, would not have relied on his judgment, but have sought for other security.

2. As *Harris* took a lease from *Sammons*, he is estopped from claiming to hold as mortgagee. The plaintiff has a right to avail himself of this estoppel. Every person who becomes interested by act of law, shall be bound by, and may take advantage of, an *estoppel*. (*Viner, Estop.* (L. 1.) (A. 2.) *Co. Litt.* 352. a.) *Estoppels* bind both parties, or neither. (12 *Mod.* 361.) As *Sammons* would not have denied the lease, neither can *Harris*. A man shall always be estopped by his own deed, nor is he permitted to prove any thing in contradiction to his own solemn act. (2 *Black. Com.* 295. *Co. Litt.* 171. *Plowd. Rep.* 433, 434.) And so far is this principle carried, that if one takes a lease by indenture, of his *own lands, it shall bind him. (*Viner, Estop.* K. *Woodfall*, 207. 2d edit.) So a feoffment enrolled, without livery of seisin, though it has no force to pass the land, yet the feoffor is estopped from saying it was

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not his deed. (*Viner, Estop. A.*) If *A.* lease land to *B.* for years, both parties are estopped to say, that the lessor had no title. (*Co. Litt. 47. b. Viner, Estop. N. 2 Ld. Raym. 1051. Shepherd's Touch. 52.*) If the defendant sets up the mortgage, while the lease is in operation, he must deny that the lessor had authority to make the lease. An *estoppel* which affects the land, runs with it, into whose hands soever the land comes. (*1 Salk. 276. 3 Term Rep. 371.*) The legal existence of the lease is incompatible with that of the mortgage; and the lease, being the last security, must supersede and dissolve the mortgage. (*Poph. Rep. 8.*)

If a mortgagee should accept a lease of the premises from the mortgagor, would he be allowed to set up the mortgage in defence to an action of debt for the rent?

3. As *Harris* was present at the sheriff's sale, and concealed his mortgage, it must be considered as a fraud on the purchaser. (*1 Bro. C. C. 63. 1 Fonbl. 161. 2 Johns. Rep. 589. Roberts on Frauds, 131.*) In cases of fraud, courts of law have power to afford relief. (*Doug. 21.*) If *Harris* meant to have claimed under the mortgage, he ought not to have attended the sale, or have made known his mortgage at the time.

Sudam, and *J. Tallmadge*, contra. A purchaser at a sheriff's sale stands in the place of the defendant in the execution, and takes his title. (*1 Johns. Cas. 153.*) The mortgage was given in *March*, 1800, and the judgment is in *August*, 1801. At the time of the judgment, *Sammons*, as mortgagor, had only an equity of redemption. The judgment could bind no more than the interest of a mortgagor. The execution commands the sheriff to levy on the lands of which the defendant was seised at the time of the judgment. Now, *Sammons* was at that time seised only as mortgagor, and no more than an equity of redemption could be sold under the execution.

A judgment is not a *lien*, nor can it affect purchasers or mortgagees, until the roll is filed, and the judgment docketed. (24th sess. c. 105. vol. 1. p. 388. Sess. 36. c. 50. 1 *R. L.* 501. 2 *Rev. Stat.* 359.) A mortgage is a better security. It is an immediate *lien*, and, though unregistered, this *lien* cannot be defeated *by a subsequent judgment. This is manifest from the provisions of the statute.

2. The doctrine of *estoppel* is not applicable to the present case. The lessor is a mere speculating purchaser, five years after the mortgage was duly registered. The paper which has been introduced as a lease is nothing more than an agreement as to the annual value of the land, of which the mortgagee took possession. The mortgage was in full force at the time. It was proper to fix the annual value of the land, in order that it might be applied to the payment of the bond

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and mortgage. By the mortgage, *Harris* acquired a fee simple at law, and if he took a lease, the greater estate would not be merged.

3. The registry of a mortgage is notice to all the world. (*Johnson v. Stagg*, 2 *Johns. Rep.* 510.) The sale was long subsequent to the registry; *Harris*, therefore, cannot claim the protection of a *bona fide* purchaser, without notice. He is a purchaser with full notice. He, no doubt, speculated upon the supposition, that the judgment would prevail against the mortgage. *Harris*, by attending the sale and bidding, could not deceive the plaintiff, because the interest to be sold was no more than that of a mortgagor, and the mortgagee had a right to become the purchaser. There is no pretence for the suggestion of a legal or constructive fraud, arising from the silence of *Harris*, when the mortgage had been duly registered for several years.

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SPENCER, J., delivered the opinion of the court. The plaintiff, having been nonsuited at the trial, has moved to set it aside. The facts are briefly these: *Cornelius Low* obtained a judgment, in the Common Pleas of *Ulster*, against *Tunis Sammons*, which was docketed on the 5th of *August*, 1801. An execution was issued on this judgment, dated the 28th *September*, 1806, and a sale was made by the sheriff thereon, of the premises in question, to the lessor of the plaintiff, and a deed was given on the 10th of *March*, 1807. *Sammons's* title to the premises on the 21st of *March*, *1800, was unquestioned. On that day, he executed a mortgage to *Thomas Harris*, of the premises, to secure the payment of 210 dollars, payable 1st *April*, after date. This mortgage was registered the 17th of *April*, 1802. At the sheriff's sale, *Harris* appeared and bid several times, and gave no notice of his mortgage, nor did he forbid the sale. On the 26th of *July*, 1803, *Sammons* gave a lease to *Harris* of the premises, for ten years, to secure the payment of a balance of 400 dollars, due him from *Sammons*, and one tenth of this balance was to be endorsed every year on the bond accompanying the mortgage; when this agreement was made, both parties talked of the bond and mortgage being in force.

A mortgagee is considered at law, and for certain purposes, as the owner of the estate. It has been decided in this court, that his interest cannot be sold on execution, (*ante*, p. 41. *Jackson v. Willard*,) because it cannot be separated from the debt; and it has been considered as a security for money. Still, however, it cannot be denied, that the mortgagee has the title, so far as to enable him to maintain an ejectment on the mortgage, not only against the mortgagor, but against such as derive title under him, subsequent to the mortgage. The

2d section of the statute concerning mortgages (1 vol. *R. L.* 481.) gives priority, in case of several mortgages of the same premises, to the first registered; and it provides that no mortgage shall defeat or prejudice the title or interest of any *bona fide* purchaser, unless the same be duly registered, according to the provisions of the statute. Before this statute, there was no necessity of registering mortgages; they would have stood upon the same footing as any other *lien* on real property. Since the statute, they must be registered, or lose their priority, as to junior mortgages, and be liable to be defeated, in case of a *bona fide* purchaser, prior to the registry. There is nothing in the statute which gives a preference to a judgment docketed over an unregistered mortgage. The judgment being by act of law, does not destroy the *lien* acquired by an unregistered mortgage, nor gain a preference *over it. Should the mortgagee permit a sale to take place, prior to the registry, then, in my opinion, the vendee of the sheriff would be protected from the mortgage, and it would lose its priority. In the present case, the mortgage to *Harris* had been registered nearly five years prior to the sheriff's sale. The mortgage being prior to the judgment, and the registry long before the sale, *Harris* had the legal title to the premises, and the lessor of the plaintiff must be deemed to have had notice of the mortgage when he purchased.

There is no weight in the objection, that by *Harris's* bidding at the vendue, he ought to be estopped from disputing the title of the purchaser at that sale. *Sammons* had a vendible interest in the premises, the equity of redemption. *Harris's* bidding, when he had a right to presume every one who bid knew of his mortgage, is not irreconcilable with the situation in which he stood as mortgagee.

The suggestion that, by the arrangement which took place between *Harris* and *Sammons*, the mortgage was surrendered, is inconsistent with their declared intentions, and is contradicted by the lease itself; for by that, the existence of the bond and mortgage is recognized. I am satisfied, that the nonsuit was correctly ordered, and that the plaintiff can take nothing by his motion.

Rule refused.

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May, 1809.

JACKSON
V.
DUBOIS.

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NEW-YORK,
May, 1809.

HUTCHINS
v.
FITCH.

HUTCHINS and CARY against FITCH.

Where a justice issued a warrant against two defendants,

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one of whom was taken, and the other returned not found; and the defendant taken pleaded to the action, and a venire was issued, which named him alone, without taking notice of the other defendant, the venire was held sufficient. The statute merely requires that the judgment must be against both joint debtors, and is silent as to the intermediate proceedings.

Where a suit was brought on a note to A. or bearer, and the defendant pleaded a former suit on the same note brought against him by B., and a judgment in favor of the defendant, it was held not to be a bar to the second suit, unless the defendant also proved that A. was the rightful owner or possessor of the note.

IN ERROR, on *certiorari*. *Fitch* brought a suit against *Hutchins* and *Cary*, before the justice, by warrant. *Hutchins* was returned taken, and *Cary* not found, and *Hutchins* agreed to go to trial. *Fitch* declared on a promissory note given by both defendants to *Joseph Rundle*, or bearer, for 25 dollars, payable on demand. *Hutchins* pleaded *non assumpsit*, and a jury, at the request of the plaintiff, was called. In the venire, *Hutchins* alone was named as defendant, no mention being made of *Cary*. The note was proved against both defendants. It was proved, that an action had been brought and tried before another justice, on the same note, between *Joshua Fitch*, plaintiff, and *Hutchins* alone, defendant, in which the jury found a verdict in favor of *Hutchins*, for 6 cents. The jury, in this case, found for the plaintiff below, for the amount of the note, on which a judgment was rendered by the justice.

The cause was submitted to the court without argument.

Per Curiam. 1. The plaintiffs in error object, that the venire did not mention the name of *Cary*, the other defendant, a joint debtor, who was not taken on the warrant. But as the act for the recovery of debts to the value of 25 dollars, says, that the joint debtor taken, shall answer to the plaintiff; and as he alone pleaded and joined issue with the plaintiff, the venire was sufficient. The mention of the name of the other joint debtor would have been matter of form only, and is cured by the verdict. The statute has expressly required, that the judgment shall be against both the debtors, against the one not taken, as well as the one taken and brought into court, and is silent as to the intermediate proceedings. (a) The return of the justice does not state explicitly the form of the entry of the judgment, but as no exception has been taken to the return in this respect, we are to presume that the entry of the judgment was correct.

2. Another objection is, that though a former trial and judgment, for the same cause of action, was given in evidence to the jury, yet they found a verdict for the plaintiff. The former suit was in favor of one *Joshua Fitch*; but it does not appear, from the return, what evidence *Joshua Fitch* gave, on the trial of the former cause, that he was the owner or bearer of

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(a) 2 Rev. Stat. 247.

the note in question. The verdict in the former cause may have been against *Joshua Fitch*, and yet be no bar to the present suit, it not being between the same parties, nor brought by the rightful owner of the note. To render the former judgment a bar, it ought, at least, to have been shown, that the former suit was by the real owner of the note. That does not appear; for nothing concerning it is stated in the return; and as the jury have found for the plaintiff below, notwithstanding the plea, the court are of opinion, that the judgment must be affirmed.

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May, 1809.
HUTCHINS
v.
FITCH.

Judgment affirmed.

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NEW-YORK,
May, 1809.

SANFORD
v.
MICKLES and
FORMAN.

SANFORD against MICKLES and FORMAN.

Where a note, payable on demand, was negotiated five months after its date, and there were several payments endorsed prior to its transfer, in an action by the endorsee, the maker was not allowed to set up any defence, as against the payee, or to impeach the amount due on

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the face of the note, at the time of the transfer. (a)

One partner, after a dissolution of the co-partnership, cannot endorse notes or bills, given before to the firm, though he is authorized to settle the co-partnership concerns.

(a) See *Sice v. Cushingham*, 1 Cow Rep 407.

THIS was an action of *assumpsit*. The declaration contained two counts; one on a promissory note, dated the 14th June, 1806, given by the defendants to *Brown and Olmstead*, for 1,249 dollars and 56 cents, payable on demand, and endorsed by *Brown and Olmstead*, to the plaintiff. The second count was for money had and received, to the use of the plaintiff. Plea, *non assumpsit*, with notice of set-off. The cause was tried at the *Onondaga* circuit, in September, 1808. The note was signed *S. Brown, jun.* for *Mickles & Co.*, and his authority to make the note was proved.

The endorsement on the note was in the hand-writing of *Olmstead*, and in the words following: "November 15, 1808. Pay the contents to *Benjamin Sanford*. *William Olmstead*, for the late firm of *Brown and Olmstead*." The partnership *of *Brown and Olmstead* had been dissolved, by mutual consent, before the endorsement was made. At the time of the dissolution, it was agreed that *Olmstead* should take the stock in trade, collect and receive the outstanding debts, and pay the debts due by the partnership; but no authority to endorse notes, or to use the name of the firm in any manner, was shown. The defendants' counsel objected, that *Olmstead* having no authority to endorse the copartnership name, after a dissolution of partnership, the plaintiff could not recover on the note; but this objection was overruled. The defendants then offered to prove, that the note was given by *Brown*, the clerk of *Mickles & Co.*, for the balance of accounts adjusted by him, and in which he included not only the demands of *Brown & Olmstead* against the firm of *Mickles & Co.*, but also what was due from the defendants individually, and that the clerk had no authority to adjust any demands against the defendants, in their separate capacities; but this evidence was objected to and overruled. The defendants then offered to prove that, in the adjustment of the accounts for which the note was given, there were several errors, which, if corrected, would materially reduce the balance, and the amount due on the note; but this testimony was objected to, and overruled by the judge. Several payments were endorsed on the note, the last of which was on the 25th October, 1806. The jury found a verdict for the plaintiff, for the balance due on the note, after deducting the payments endorsed.

On the motion to set aside the verdict, and for a new trial, two questions were raised:

1. Whether one partner, after a dissolution of the partnership, can endorse a note given to the firm, so as to enable the endorsee to maintain an action in his own name against the firm.

2. Whether a note, payable on demand, endorsed five months after date, on which sundry payments are endorsed at the time, is to be considered as due at the time of its being negotiated, so as to entitle the makers to set up any defence against the endorsee, which they might have done in an action brought by the original payee.

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Kirkland, for the defendant, as to the first point, cited *Lansing v. Gaine & Ten Eyck*, (2 Johns. Rep. 300.) *Hackley v. Patrick*, (3 Johns. Rep. 536.) *Kilgour v. Finlyson and others*, (1 Hen. Black. 155.) and *Abel v. Sutton*, (3 Esp. Cases, 108.)

As to the second point, he contended, that the payments endorsed on the note, between its date and the time of its transfer, showed that payment had been demanded, and that the note was actually due; and that this was sufficient to put the plaintiff on the inquiry. In the case of *Furman v. Haskin*, (2 Caines's Rep. 369.) the court decided, that a promissory note, payable on demand, negotiated by the payee, eighteen months after it was made, was to be considered as due and dishonored, and that the endorsee took it on the credit of the endorser, and subject to all the equities existing between the original parties. A note, payable on demand, must be presented in a reasonable time, otherwise it will be considered as dishonored; and what is a reasonable time, is a question of law, (1 Term Rep. 168. 3 Term Rep. 80. 7 Term Rep. 422. *Chitty on Bills*, 2d ed. 98. 100. 197, 198, 199.) arising from the facts found by the jury.

Gold, contra. 1. The endorsement in the name of the firm or the payees, by one of the partners, was merely to enable the plaintiff to recover in his own name. It created no new responsibility on the part of the partners. The objection does not lie in the mouth of the party, who is subjected to no new responsibility. The authority of *Olmstead* to endorse the copartnership name necessarily arose from the transfer of the partnership stock and outstanding debts to him. In the cases cited, the endorsement went to create a new responsibility.

2. In the case of *Furman v. Haskin*, the note was negotiated 18 months after it was made; in the present case, 5 months only had elapsed. It is true, that payments are endorsed on the note; and the last endorsement is strong evidence that all prior payments were correctly endorsed, and that the de-

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NEW-YORK, fendants had really no ground to object to the payment of the
May, 1809. sum due as it appeared on the note.

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YATES, J., delivered the opinion of the court. 1. It has been decided in the case of *Furman v. Haskin*, (2 *Caines*, 369,) that a note payable on demand, endorsed after a lapse of eighteen months, was to be considered as dishonored and over due, and that the endorsee took it liable to every defence which might have been made by the payee. It is, however, not decided, that a note payable on demand, and endorsed within a shorter period than eighteen months, would not be attended with the same consequences; each case ought, perhaps, to be governed by its own peculiar circumstances. In the one now before us, a number of payments have been endorsed, and the last but a few days prior to the assignment, and about five months after its date. From the last endorsement, it may be presumed, that all antecedent payments had been noticed and entered in the same manner; the plaintiff had a right to consider the amount due at the time of the transfer, after deducting the payments, to be the true balance; the defendant was, therefore, properly prevented from impeaching the note, as given for too large a sum. (a)

2. The authority which exists during the continuance of a partnership, from one partner to bind his copartner, ceases on its dissolution; and with respect to antecedent debts, contracted during the partnership, the power to receive payments and give discharges, rests on the same principle with that of joint obligees or payees of a note, not otherwise connected as partners. The cases cited have been determined with a view of protecting one partner from a responsibility which might be created against him, in consequence of the negotiation of bills by the other, after the dissolution. It is impossible to separate the right to endorse a bill by one, passing the title, from the legal responsibility on all those having an interest in it.

(a) When a note is payable on demand, it must be presented within a reasonable time for payment, or it will be considered as out of time and dishonored; and if it be afterwards negotiated, it will, in the hands of the endorsee, be liable to all the equities which subsisted between the original parties. *Furman v. Haskin*, 2 *Caines*, 369. In an action by the endorsee against the drawer of a note, dated in *Philadelphia*, payable on demand, without defalcation, where it appeared that the payee lived in *Philadelphia*, and the drawee at a distance of one hundred and eighty miles; and that the first notice which the drawer received of the endorsement was fourteen months after the date of the note, previous to which notice he had made payments to the payee; it was held, that the jury might presume that the endorsee had notice of the payments. *Cromwell v. Arrol*, 1 *Serg. & Rawle*, 180. There is no precise time within which a note payable on demand is to be deemed dishonored; it must depend on the circumstances of the case; but such a note, negotiated eighteen months after its date, will be deemed out of time. *Furman v. Haskin*.

*The decided manner in which Lord *Kenyon* (3 *Esp. Cas.* 111.) denies the right of one partner, after a dissolution of the partnership, to endorse bills given before, if he even had authority to settle the partnership accounts, induces me to believe the doctrine as settled. It would be a peculiar hardship, to put a partner, retired from the whole concern, so completely in the power of the other, as to charge him, by negotiating bills given during the partnership. This power being denied, it follows, that they must all join in the transfer of a bill negotiated after the dissolution, for the purpose of vesting the title in the endorsee. The court are, therefore, of opinion, that the verdict must be set aside, and a new trial be granted.

NEW-YORK,
May, 1809.

ROSEKRANS
v.
VAN ANT-
WERP.

New trial granted.

ROSEKRANS *against* VAN ANTWERP.

IN ERROR, on *certiorari*. The return stated, that *Van Antwerp* brought an action against *Rosekrans*. On the return of the summons, *Van Antwerp* appeared by attorney, being out of the county at the time, and which was known to the justice; but no proof of it was made. The plaintiff below declared, that the defendant had sold him a set of harness, which he warranted to be well made, and averred that it was not well made, but useless, and also for money had and received to his use. The defendant pleaded *non assumpsit*, and also that the plaintiff had given him a receipt for 20 dollars, for a set of old harness, and 20 shillings costs, in full of all demands. The plaintiff replied, that the receipt was not genuine. The cause was tried before a jury, and the defendant, being sick and unable to attend, appeared by attorney. The jury, after hearing the evidence, gave a verdict for the plaintiff for 14 dollars; for which the justice gave judgment, to reverse which the present *certiorari* was brought. The cause was submitted to the court without argument.

A justice cannot permit a party to appear by attorney, from his own knowledge of the fact, that the party is absent at the time, and out of the county; he must have proof of the fact.

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Per Curiam. One principal objection to the proceedings in the case below is, that the justice admitted the plaintiff to appear by attorney, upon his own knowledge of the fact of his absence from the county; and at the different days to which

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the cause was adjourned, the same attorney appeared, as the plaintiff had not returned to the county. The statute on this subject (31 sess. c. 204.) declares, that it shall not be lawful for the justice to permit any person to appear and advocate in his court for any party, unless such party be prevented from attending, by reason of sickness or absence from the county, of which proof is to be made. The question is, whether the justice acted upon the requisite proof of the absence of the plaintiff below. He returns that the plaintiff was absent from the county, "to his certain knowledge." As this provision in the statute is a pretty rigorous restraint of the common law right of every party to appear by attorney, and may operate, in many cases, most severely upon a party who is wholly unskilled in conducting a cause, or even in stating a case, we could wish that the *proviso* admitted of greater latitude of interpretation: but as the statute is explicit, that *proof* of the absence of the party must be made, before the attorney is to be admitted, the justice cannot act from his own knowledge, and call that knowledge proof. Such a principle would be dangerous, and is contrary to the decision of this court, in the case of *Burlingham v. Deyer*, (2 *Johns. Rep.* 189.) The proceedings on the part of the plaintiff below were, therefore, without authority, and contrary to law; and for this reason the judgment below must be reversed.

Judgment reversed.

NEW-YORK,
May, 1809.JACKSON
V.
BARD.*JACKSON, *ex dem.* GRISWOLD and another, against
BARD.

THIS was an action of ejectment for land in *Philipstown*, in the county of *Dutchess*. The cause was tried at the *Dutchess* circuit, before Mr. Justice *Van Ness*, in *September*, 1808.

The plaintiff gave in evidence a mortgage from *Samuel Dickenson* to *Roger Barton*, dated the 8th *March*, 1779, for 160 acres of land, including the premises in question, being one quarter of an acre, made to secure the payment of 865 dollars, in two years.

R. Barton, the mortgagee, was offered as a witness on the part of the plaintiff, and was objected to, on the ground of his having conveyed the premises; but it appearing that the deed contained no covenants whatever to the purchaser, the objection was repelled, and the witness admitted. He testified, that about 10 months before the mortgage was given, *Dickenson* and one *Harris* entered into articles of agreement with him for the purchase of the mortgaged premises. The deed from the witness to *Dickenson*, and the mortgage to the witness, were executed at the same time. The plaintiff then gave in evidence a deed from *Barton* to the lessors, for the mortgaged premises, pursuant to a sale thereof, made according to the statute. *John Barton*, a witness for the plaintiff, testified, that he had known the premises 40 years, and deduced the possession down to *Roger Barton*. He said that the *Benjamin Smith* came into possession of the premises in 1798, by virtue of a purchase, by articles of agreement, made with *Dickenson*, to whom he paid the sum of 25 dollars, and built a house on the land, and lived thereon until after *May*, 1790. The witness was present at the time of the sale of the mortgaged premises, and one *Linzey*, then present, and who was in possession of the premises, forbade the sale, and told *Barton* and *Griswold*, that he had a deed from *Smith*. *On this evidence, the defendant's counsel contended, that there was such an adverse possession, at the time of the mortgage, that the property could not pass by that deed. But the judge overruled the objection.

The defendant also gave in evidence a deed of the premises from *Dickenson* and his wife to *Benjamin Smith*, dated 11th *March*, 1799; a deed for the same, dated the 2d *October*, 1801, from *Smith* to *Peter Linzey*; and a deed, dated 1st *May*, 1806, from *Linzey* to the defendant.

The plaintiff's counsel endeavored to show, that the first

Where *A.* went into possession of land under an agreement made with *B.* for the purchase; and *C.* afterwards took possession under an agreement with *A.* for the purchase, the possession of *C.* was held not to be adverse to the title of *B.* (a)

A *feme covert* who had executed a deed with her husband, was held a competent witness to prove that the deed had been antedated. (b)

The declarations of a person in the possession of land as to his title, are admissible evidence against him and all persons claiming under him.

A deed may in its operation be made to relate back to the time of the contract for the purchase of the land, as between the same

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parties, and for the furtherance of justice, but not so as to do wrong to strangers.

(a) *Jackson v Walker*, 7 Cow. Rep. 637. 1 Cow. Rep. 610.

(b) *Jackson v Nelson*, 6 Cow. Rep. 246.

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V.
BARD.

deed was antedated, and that it was apparent that it was written on an erasure. The deed was shown to the jury.

Eleanor Gallaway, who was the wife of *Dickenson*, and had executed the deed to *Smith*, was offered as a witness, to prove that the deed was antedated. She was objected to as incompetent, but the objection was overruled. She said that she believed the deed to be the same she had executed, but did not certainly know, as she could not write nor read; that she never executed but one deed with her husband to *Smith*. The witness was asked what she heard *Smith* say about his title while he was in possession, and before he sold the premises; an objection was made to the question, but the judge permitted the inquiry to be made. The witness stated that *Smith*, after the death of *Dickenson*, wished her to take the land, as *Barton* claimed it, and he was afraid would hold it.

Roger Barton, though objected to, was also examined, as to the confessions of *Smith*. He testified, that in a conversation with *Smith* relative to the mortgage and the deed, *Smith* asked *Barton* about antedating the deed, and wished him to sign it; that he understood the mortgage was of a prior date to the deed; that *Dickenson* was dead, and he wished to have no further contention, and offered the witness 25 dollars to sign his name to the deed.

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The subscribing witnesses to the deed who were called, could not recollect the precise time of its execution, but *only mentioned circumstances to induce an opinion that it was subsequent to the mortgage.

The judge charged the jury, that from the face of the deed from *Dickenson* to *Smith*, he thought it apparent that the date had been written on an erasure, and that circumstance created a suspicion that it was antedated; that if the deed was executed after the 19th March, 1799, though dated before, it passed no title sufficient to bar the plaintiff's right to recover; that the weight of evidence arising from the circumstances mentioned by the witnesses to fix the time of the execution and delivery of the deed, was against the defendant. The jury found a verdict for the plaintiff.

Fisk, for the defendant, moved to set aside the verdict. He contended for the following points:

1. There was an adverse possession in *Smith* at the time of giving the mortgage, so as to prevent the premises from passing by the mortgage.
2. *Eleanor Gallaway* ought not to have been admitted as a witness, to prove that the deed had been antedated.
3. That the evidence of *Smith's* declaration about his title, was inadmissible.
4. That the deed was not antedated.

5. That the date was immaterial, and that the operation of the deed would relate to the time when *Dickenson* could pass the fee of the land. (1 *Johns. Cases*, 85.)

6. That the charge of the judge was not warranted by the evidence, and that the verdict was against evidence.

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v.
BARD.

J. Tallmadge, contra. He cited 4 *East*, 477. 1 *Black. Rep.* 365. 4 *Burr.* 2225. 3 *Term Rep.* 34. 36. 1 *Johns. Rep.* 343. 1 *Esp. Cases*, 453. 2 *Term. Rep.* 53. 1 *Str.* 662. 4 *Cruise*, 355. *Cowp.* 807.

*THOMPSON, J., delivered the opinion of the court. I shall briefly examine the several questions raised on the argument, in the order in which they were made.

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1. The possession of *Smith* could not be considered adverse to *Barton*, so as to prevent the operation of the mortgage under which the lessors of the plaintiff make title. The agreement between *Barton*, and *Dickenson* and *Harris*, for the purchase of the 160 acres, of which the premises are a part, was made about ten months prior to the date of the mortgage, which would bring it to some time in the latter part of the spring of the year 1798. *Smith*, it appears, went into possession of the particular premises in question, in the summer of 1798, under an agreement with *Dickenson* for the purchase, and remained there in this character, when the deed and mortgage between *Barton* and *Dickenson* were executed. This would not be deemed an adverse holding. It was not hostile to *Barton's* title. *Dickenson* could not have set up against *Barton* an adverse holding, and *Smith*, who claimed under him, must be considered as standing in the same situation.

2. *Eleanor Gallaway* was not an interested witness; the verdict in this cause could never have been given in evidence, in an action of dower brought by her. But another answer to the objection is, that she was called to testify as to the time the deed was actually executed. Admitting it to have been antedated, it would be good and effectual from the time of its execution: an acknowledgment, therefore, at any time, duly made by her, would take away her right of dower; and if she never had legally acknowledged it, her signing would be no bar to her claim of dower, so that on no ground whatever could she be interested. She was not by her deed estopped from showing it to have been executed at a time different from the date. The date is unimportant. The execution and delivery is the important time from which a deed is to take effect. (2 *Johns. Rep.* 234. 4 *East*, 477. 3 *Lev.* 348.)

*3. The declarations of *Smith*, while in possession of the premises, as to his title, were admissible against the defendant.

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These declarations would have been good against *Smith*, and are also competent evidence against all who claim under him. This principle has been repeatedly recognized, both in our own and in the *English* courts. (1 *Johns. Rep.* 343. 1 *Esp. Ca.* 458. 2 *Term Rep.* 53.) (a)

4. Whether the deed from *Dickenson* to *Smith* was actually executed at the time it bears date, was a question proper for the consideration of the jury. Some doubt may exist as to that fact. I am inclined, however, to think, that the verdict is according to the weight of evidence; at all events, it ought not to be set aside on this ground.

5. The deed from *Dickenson* to *Smith* cannot, in its operation, relate back to the time the contract between them was made, so as to bring it within the scope of the decision in the case of *Jackson v. Raymond*. (1 *Johns. Cases*, 85. *note*.) It is a general rule, with respect to the doctrine of relation, that it shall not do wrong to strangers; as between the same parties it may be adopted for the advancement of justice. (3 *Caines*, 263.) *Barton* was a stranger to the contract between *Dickenson* and *Smith*, and it would be the extreme of injustice to permit his mortgage to be defeated, by considering *Smith's* deed to take effect by relation, from the time he made his contract for the purchase of the premises.

6. There are no grounds for any objection against the charge of the judge. The case was fairly submitted to the jury, with such observations as the testimony warranted.

On every ground, therefore, the motion for a new trial must be denied.

Rule refused.

(a) The declaration of a deceased tenant that he held land under a particular person, has been held to be admissible to prove the seizin of that person. 1 *Stark. Ev.* 70. (*Am. ed.* 1828.) *Andrews v. Fleming*, 2 *Dall.* 93. *Weidman v. Korr*, 4 *Serg. & Rawls*, 174. *Little v. Libby*, 2 *Greenl. Rep.* 242. *Adams v. French*, 2 *New Hamp. Rep.* 357. So in ejectment, declarations of a person under whom the defendant claimed, that he held only as tenant on sufferance to the plaintiff, were allowed to be given in evidence by the plaintiff. *Andrews v. Fleming*. And where one had granted a mill to A., and afterwards conveyed to B. a tract of land through which the water for the mill ran, it was held that declarations of the grantor to persons in possession under B., that all the water of the stream belonged to the mill, were admissible in an action against one claiming under B. for disturbing the water. *Strickler v. Todd*, 10 *Serg. & Rawls*, 63. The declarations of a supposed grantor, who may be considered interested at the time to declare in the particular manner testified to, are not admissible for any purpose whatever. *Bartlet v. Delprat*, 4 *Mass. Rep.* 702. *Clarke v. Waite*, 12 *Mass. Rep.* 439. But the conduct and declarations of a grantor before a conveyance, respecting the estate conveyed, and tending to prove a fraudulent intention on his part to defeat his creditors, is proper evidence upon an inquiry, before a jury, into the validity of such conveyance, by a creditor who alleges it to be fraudulent. *Bridge v. Eggleston*, 14 *Mass. Rep.* 245. The declarations of a man respecting his title to lands, made before he parts with his estate therein, are evidence against him, and all claiming under him. *Dorsey v. Dorsey's Heirs*, 3 *Har. & Johns.* 426.

NEW-YORK,
May, 1809.BURNET
v.
M. BISCO.

*BURNET against M. BISCO.

THIS was an action of *assumpsit*. The declaration stated, that on the 26th *February*, 1808, the defendant made an agreement in writing with the plaintiff, whereby she agreed to give the plaintiff the refusal of the farm on which she lived, with the south half of the house, for the term of two years, from the 1st *April*, 1808, together with the stock, &c., at the following rate, viz. for the first year, 600 dollars, 140 of which to be paid in *November*, 160 dollars in *December*, and the remainder on the 1st *May* following. For the second year, 900 dollars was to be paid at the like periods, the stock to be appraised by certain persons, on the 1st *April*, 1808, and again at the end of the two years, and the same amount of stock to be returned, and good security given for the performance of the contract; the farm to be left in as good repair at the end of the two years, as at the commencement, &c. &c.; reserving to the defendant land sufficient for her son to keep three horses, and for him to improve in his own person, and for pasturing a cow. The plaintiff averred, that on the 1st *April*, 1808, he performed the agreement, as far as his part was to be performed, and was then at the place ready to have the stock appraised, &c., and also tendered good security for the performance on his part, &c., yet the defendant, not regarding, &c., assigning breaches of the whole agreement on the part of the defendant.

In an action on a written agreement to give the plaintiff the refusal of a farm, &c. it was held that it was necessary to show a consideration for the promise. It is as necessary to state a sufficient consideration where the agreement is reduced to writing, as if it remained in parol.

To this declaration the defendant demurred specially, and assigned the following causes:

1. Because the plaintiff, though he states that the defendant did not give the plaintiff the refusal of the farm, &c., does not state that the defendant disposed of the farm to any other person, or that she retained it herself.

2. That the declaration does not state where the farm was situated, nor its value, nor the number of acres, nor the quantity of land to be reserved for the defendant's son, nor how much was requisite for the defendant's son; so that, by reason of this uncertainty, there was no rule by which to measure the damages.

3. The declaration does not state who were to be the appraisers.

4. The plaintiff does not state what kind of security he offered, nor whether it was written or parol.

To this demurrer there was a joinder, and the same was submitted to the court without argument.

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Per Curiam. A defect in substance in this declaration is, that there is no consideration stated. The defendant agreed to give the refusal of the farm to the plaintiff; but he did not agree to take it, and there was no promise on his part as a consideration for the promise of the defendant, nor any money paid, or other valuable consideration given. The agreement was a mere *nudum pactum*. A consideration is as necessary to an agreement reduced to writing, as if it remained in parol. (1 *Saund.* 211. note 2.) There must be judgment for the defendant.

Judgment for the defendant.

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v.
VANDERLYN.*ELTING and others, Administrators of ELTING, against
VANDERLYN.

THIS was an action of *assumpsit*. The declaration stated, that one *Zachariah Hoffman*, now deceased, was, in his life-time, justly indebted to the intestate, in his life-time, in divers sums of money, &c.; that the intestate, in his life-time, was about to sue the heirs of the said *Hoffman*, for the recovery of the sums so due to him; "that thereupon the said *Jacobus Vanderlyn*, in consideration that the said *R. I. Elting*, (the intestate,) in his life-time, at the special instance and request of the defendant, would forbear to prosecute the heirs of the said *Z. Hoffman*, of which the defendant, in right of his wife, was one, he, the defendant, undertook and faithfully promised the intestate, in his life-time, and since, to wit, on the 1st May, 1807, at, &c., undertook and promised the plaintiff's administrators to pay them the several sums of money so due and owing from the said *Hoffman*, in his life-time, to the said *Elting*, in his life-time, &c.; that the said *Elting*, in his life-time, confiding in the said promise, &c., did forbear to prosecute, &c. for two years and longer, and hitherto hath forborne to prosecute, &c.; and that the plaintiffs, as administrators, since the death of *Elting*, have also forborne to prosecute," &c. The defendant pleaded *non assumpsit*, and *non assumpsit infra sex annos*.

The cause was tried at the *Ulster* circuit, in *September* last, when the jury found a verdict for the plaintiffs.

A motion was made, at the last term, in arrest of judgment, on the following grounds:

1. Because the promise of the defendant was for the benefit of the heirs of *Hoffman* generally, and so within the statute of frauds.

*2. Because the plaintiffs ought to have averred in their declaration, that the defendant, as one of the heirs, had received *assets* from the ancestor.

3. Because a promise to pay, in consideration of an indefinite forbearance, is void.

Hawkins, for the defendant. 1. The statute (24th sess. c. 50.) which makes heirs liable, on simple contracts and specialties, for the debts of their ancestors, (a) makes them jointly responsible. It is a contract, and, as such, must be joint. The defendant could only be answerable for his proportion of the debt, as

A declaration on a promise to pay the debt of another, need not state that the promise was in writing. That is matter of evidence at the trial, and after verdict the court will presume that it was proved to be in writing. Where one of several heirs is sued on his promise to pay the debt of the ancestor, the plaintiff need not allege that the defendant or heirs had assets.

A forbearance to sue generally is a good consideration for a promise to pay the debt of another.

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one of the heirs. His promise, therefore, to pay the whole, was a promise to pay the debts of the other heirs; it is a *parol* undertaking for the debt of another, and so within the statute of frauds.

2. In every case, the plaintiff ought to allege in his declaration, sufficient to entitle him to recover. The plaintiffs ought to have alleged that the defendant was heir and had *assets* by descent; for though the ancestor may have given a bond, or been indebted, it does not follow that the heir is liable, unless he has assets by descent. (2 *Saund.* 136. 3d *ed.* and *note.*) As the defendant was not impleaded as heir, he could not plead *riens per descent*.

3. A forbearance generally, without specifying any time, is not a sufficient consideration to support an *assumpsit*. In *Lutwich v. Hussey*, and *Philips v. Sackford*, (*Cro. Eliz.* 19. 455.) it was decided, that a promise to forbear indefinitely, was not a good consideration. There must be some certain time limited. (*Cro. Jac.* 250.) At least, the forbearance should be for a reasonable time. (*Hutton*, 108.) It is true, that where there is any lien lost, or benefit conferred by the forbearance, this will be a good consideration for the promise. (*Bull. N. P.* 281. *Cowper*, 128. *Hutton*, 101. *Hardres*, 72.)

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Sudam, contra. 1. The declaration need not state that the promise was in writing; that fact must appear in evidence at the trial. If such a promise be stated, as, if in writing, would be valid under the statute, the court, after **verdict*, will intend that it was proved to have been in writing, and the judgment cannot be arrested on that ground.

2. The plaintiffs do not charge the defendant as heir; it was not necessary, therefore, to allege that he had assets by descent. The action is founded on the promise of the defendant to pay the debt of the heirs. Under our statute, heirs are liable for the simple contracts of their ancestors, though not so in *England*. Where the declaration is against an executor or heir, on his own promise to pay, assets need not be alleged; for if there is a sufficient consideration, or the promise be valid, he is liable whether there be assets or not. (1 *Saund.* 211. a. *note.* 2 *Saund.* 137. b. *note.*)

3. The cases cited from *Cro. Eliz.* have been overruled by subsequent decisions; and, particularly, in the case of *Mapes v. Sidney*, (*Cro. Jac.* 683. See also *Cro. Jac.* 47. 273. and *Cro. Car.* 241. *Hobart*, 216.) where it was laid down, that a forbearance to sue generally was a good consideration for a promise. If it appear that the plaintiff did forbear a reasonable time, it will be sufficient. By forbearing to sue, the plaintiff suffers a damage.

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VAN NESS, J., delivered the opinion of the court. 1. There is no pretence for bringing the promise within the statute of frauds. (a) Whether the promise was in writing or not, need not appear in the declaration. That is matter of evidence only; and after verdict, we must presume that it was in writing. Forbearance to sue is a sufficient consideration for a promise to pay the debt of another. (1 *Saund.* 211. a. note.)

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2. The defendant is not sued as heir, but on a promise to pay the debt of the heirs, and the question of assets does not, therefore, arise. Heirs, under our statute, are liable for the simple contract debts of their ancestor.

3. The consideration of forbearance generally is sufficient, without setting forth a specific time. There was, in fact, a total forbearance for a long time, which brings the *case within that of *Mapes v. Sidney*. (*Cro. Jac.* 683.) The court are of opinion, that the motion must be denied.

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Motion denied.

(a) 2 *Rev. Stat.* 135.

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SHULTZ.

S. HALL *against* SHULTZ and SHULTZ.

Where A. agreed to buy in the land of B., which was to be sold on execution, and reconvey it to him, on payment of the money advanced, and a reasonable compensation for his trouble; and A., having bought the land, refused to reconvey it to B. unless he paid 300 dollars in addition to the principal and interest of the sum advanced by A., and B., in order to obtain his land, paid the 300 dollars; it was held that B. could not recover the money back, so paid, in an action for money had and received to his use. (a)

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(a) See *Serrill v. Crosby*, 14 Johns. Rep. 358.
Moran v. Hays, 1 Johns. Cha. Rep. 339.
Battisford v. Ben, 2 Johns. Cha. Rep. 405.
Steele v. Steele, 5 Johns. Cha. Rep. 1.
Van Alstine v. Wimple, 5 Cow. Rep. 162.

THIS was an action of *assumpsit* for money had and received to the use of the plaintiff.

The following facts appeared from the evidence at the trial. The farm of the plaintiff was about to be sold by the sheriff, on an execution issued out of this court; and one *William Swart* agreed with the plaintiff to bid off the farm and advance the purchase money, and to reconvey the farm to the plaintiff on payment of the money so advanced on the sheriff's sale. One *Yeomans*, who was a witness in the cause, was employed by *Swart*, who was going from home, to transact the business for him, and was told by *Swart*, that if the defendants came to bid off the farm, he might permit them to do it, as it was the same thing as if he (*Swart*) should do it. On the day of sale, one of the defendants, *Jacob Shultz*, was present, and told the witness, that he had come over for the purpose of bidding off the farm for the plaintiff; that he had the money to pay for it, and if he should bid it off, he would convey it to the plaintiff, on being repaid the consideration money.

A son of the plaintiff, in behalf of his father, agreed with *Jacob Shultz*, that he should bid off the farm for the amount of the execution, and if the plaintiff repaid the money with interest, in four months, the farm should be reconveyed to the plaintiff, and *Shultz* said that he would not charge the plaintiff more than the interest, beyond the amount advanced, *unless the plaintiff should think proper to allow him something for his trouble; and the witness answered, that he did not doubt that his father would make *Shultz* a reasonable compensation for his trouble. Another witness who was present, stated the agreement to be, that *Shultz* was to bid off the farm, and reconvey it, at any time, within 12 months, on the repayment of the purchase money with interest, and a reasonable compensation for his trouble.

After the defendants had bid off the farm, the plaintiff called on them for the purpose of having the agreement reduced to writing, when the defendants refused to reconvey the farm to the plaintiff, unless he would pay them the consideration money and interest, and the further sum of 300 dollars, for their trouble and expense in attending to the business. A written agreement was then made by the defendants, as follows: "We, the subscribers, do hereby certify, that we will let *Samuel Hall* have the farm again he now lives on, by paying us the same which we paid the sheriff for in *Ulster* county, with the interest from 212

the date, and 300 dollars for our expenses and trouble, which must be paid on or before the first day of *April* next; if not paid then, shall be void, and of no effect. As witness our hands, this 30th day of *December*, 1805." Signed, "*John F. Shultz*." The plaintiff reminded the defendants of their former agreement to wait four months, and the agreement was altered from two to three months. The plaintiff objected to the payment of the 300 dollars, observing that it was a very large sum for so short a time, but he knew that he must pay whatever the defendants demanded; upon which, one of the defendants replied, that he had been obliged to ride three or four days to obtain the money, as he had it not on hand, and that the farm was worth 8,000 dollars.

On being told by one of the witnesses that the 300 dollars was a pretty large sum, one of the defendants said that they had a great deal of trouble in raising the money, and that he had been obliged to ride day and night to obtain it. *The witness observed, that he thought any person would take a great deal of trouble for so large a sum, upon which the defendants replied, "Yes, if one could have such opportunities often enough."

The plaintiff paid the sum advanced by the defendants, with interest, and also the 300 dollars; to recover back the last sum the present suit was brought.

The judge, before whom the cause was tried, ordered the plaintiff to be called and nonsuited, with leave to move the court to set aside the nonsuit, and for a new trial.

Ruggles and *Hawkins*, for the plaintiff, contended that the payment of the 300 dollars must be considered as compulsory. In the case of *Astley v. Reynolds* (2 Str. 916.) where plate had been pawned for 20 pounds, and the pawnee refused to return it without being paid 10 pounds for the interest, which the pawnee paid, he was allowed to recover back the excess, on the ground of its being extorted, by taking an advantage of the necessity of the plaintiff. Lord *Mansfield*, in the case of *Smith v. Bromley*, (*Doug.* 696. in note.) said, that if a man makes use of what is in his power to extort money from one in distress, it was illegal and oppressive, and that an action would lie to recover back what the party had been so unjustly compelled to pay. The principle of this decision has been repeatedly recognized and sanctioned by the *English* courts.

Sudam. The parties must be confined to the written agreement, and by that the plaintiff could have compelled the defendants to have reconveyed the land on the payment of the principal sum with interest, and a reasonable compensation for their trouble, so that the plaintiff was under no necessity to pay the 300 dollars, unless he was willing to do so. This case

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differs from that of *Asiley v. Reynolds*, where the party could not, by an action of trover, get back the plate he had pawned. The payment of the 300 dollars must, therefore, be considered as voluntary on the part of the *plaintiff, and he ought not now, after the lapse of three years, to be allowed to recover it back. Where a party pays money with a full knowledge of all the facts, and of his legal rights, he can never recover it back. (2 East. 469. 471. n. a. 2 Conty. on Cont. 40, 41. 1 Esp. Cases N. P. 84.)

SPENCER, J. The plaintiff has brought this action for money had and received, to recover back 300 dollars voluntarily paid by him, under the following circumstances. The plaintiff's farm was about to be sold on execution, and the defendants, at his instance, came forward and bid it off, under a parol agreement, as stated by one of the witnesses, to reconvey it to the plaintiff, on being repaid the money advanced, and by another witness, to reconvey, if the plaintiff paid the amount advanced, with legal interest, in four months, unless the plaintiff should think fit to allow them something for their trouble. By another witness it was stated, that the defendants were to reconvey the farm at any time, within a twelvemonth, on the repayment of the purchase money with the legal interest, and a reasonable compensation for their trouble. Soon after the purchase of the farm by the defendants, at public auction, the plaintiff applied to them to reduce the agreement to writing: this they did, and by the writing which they gave to the plaintiff, they agreed to convey to him the farm, on being refunded the money advanced with interest, and 300 dollars for their expenses and trouble, in about two months from the time of the sale. On receiving this written proposition, the plaintiff observed to the defendants, that 300 dollars was a very large sum for so short a time, but he knew he was obliged to pay whatever they demanded. The plaintiff also observed, that the defendants had agreed to give him four months to redeem, on which, one of the defendants stated he had been obliged to ride three or four days for the money, not having it on hand, and the agreement was altered by extending the time one month longer. The plaintiff, within the time specified, paid the defendants the amount advanced by them, the interest, and 300 dollars for their trouble. The farm was *worth 8,000 dollars, and had been bid off at more than 3,000 dollars.

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On this proof, the judge directed a nonsuit, which the plaintiff has moved to set aside, for misdirection.

The defendants having, with their own money, purchased the plaintiff's farm, on an execution, under a parol agreement, I strongly doubt, whether there existed any remedy for him at law or in equity, to enforce this agreement or to recover dam

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ages for its non-performance. It related to lands, and comes within the 11th section of the statute for the prevention of frauds, which declares that no action shall be brought whereby to charge any person upon any contract or sale of lands, or any interest in or concerning them; unless the agreement, or some note thereof, be in writing. The wisdom of this statutory provision is rendered manifest by the facts in this case: the witnesses who speak of the contract, all differ from each other as to its terms. Viewing, as I do, the defendants under no legal obligation to reconvey the property they had purchased, when the plaintiff afterwards treated with them for the re-acquisition of the farm, he treated as a purchaser, and they had a right to exact such terms as they saw fit. It is in vain to urge the moral obligation which the defendants were under from their parol agreement, or the hardship of the particular case; courts of law cannot enforce moral duties, or relieve particular hardships, without a legal basis. If parties are inattentive to their own interests, from too great confidence, or from ignorance, they must frequently be remediless.

The present case has been compared to a set of cases, where money has been unjustly extorted, and a remedy has been afforded, by an action for money had and received, to recover it back. The case of *Astley v. Reynolds* (2 Str. 916.) has been cited. Plate was pawned to raise 20 pounds. At the end of three years, the pawner came to redeem, and offered to pay the money, and 4 pounds, which was more than the legal interest; the pawnee demanded 10 pounds. There was a second tender of the 4 pounds; it was refused, and the 10 pounds insisted on. The plaintiff paid it, and got his *goods, and brought his action to recover the surplus beyond the legal interest; and he recovered, on the principle that it was a payment by compulsion, and that he must have had such an immediate want of his goods, that an action of trover would not do his business. The principle of this case has been subsequently overruled by Lord *Kenyon*, in the case of *Knibbs v. Hall*. (1 Esp. 84.) There a landlord had exacted 5 guineas more than the real rent of chambers, which demand the tenant resisted, insisting that the rent was 20 and not 25 guineas, and to avoid a distress which was threatened, paid at the rate of 25 guineas. His lordship held this was not a payment by compulsion, as the tenant might, by a replevin, have defended himself against the distress; and, therefore, after a voluntary payment so made, he should not be allowed to dispute its legality. Without undertaking to pronounce between the cases cited, the present differs materially from both; here there was no legal right to demand a conveyance of the property; there was no title to it on the part of the plaintiff; besides, there was no standard whereby to ascertain the allowance which ought to

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have been made to the defendants for their trouble. In the case from *Strange*, the standard was the legal interest, and in the case decided by Lord *Kenyon*, the sum exacted beyond the rent stipulated, was a fact depending on proof, and would have been the amount which the defendant had a right to claim. The case of *Smith v. Bromley* (*Doug.* 696. in *note.*) has also been relied on; in that case, money had been advanced by a relation of the bankrupt, to induce a creditor who refused, without such advance, to sign a certificate. An action was brought to recover it back, and though Lord *Mansfield* was at first against the action, he afterwards, with the other judges, sustained it, as coming within the letter and reason of the statute which prohibited such inducements being taken. On the ground that there existed no legal right on the part of the plaintiff, to demand or enforce a conveyance, that he must be considered in the light of any other purchaser, and that the defendants might make their own terms, and that the plaintiff has voluntarily, *and with his eyes open, fixed the compensation claimed by the defendants, and paid them the money, he can have no claim to call on the court to aid him in getting rid of what he conceives an unconscientious advantage. But, if there did exist a legal remedy to enforce a reconveyance, as the measure of the defendants' claim to compensation rested in arbitrary discretion, the plaintiff, by voluntarily acceding to the terms proposed by the defendants, has lost any right to call on a jury to relieve him from an allowance deliberately fixed by himself.

The nonsuit, in my opinion, was properly directed.

THOMPSON, J. The application, in this case, is to set aside the nonsuit ordered at the trial. The action was for money had and received, and is attempted to be maintained on the ground that the defendants had, by imposition, oppression, and taking an undue advantage of the plaintiff's situation, extorted from him a sum of money, which he has sought by this action to recover back. That these allegations, if made out in proof, afford a good cause of action, cannot be denied. A brief statement of the leading facts in the case becomes necessary, to see whether the transaction is stamped with the character attributed to it. The plaintiff's farm being about to be sold under an execution, which he could not immediately discharge, he, by his agent, agreed with *Jacob Shultz*, to bid off the farm, he, *Shultz*, promising to reconvey it to the plaintiff, on being within a certain time reimbursed for his advances, with the interest, and a reasonable compensation for his trouble. On the day of sale, *Shultz* attended, and declared to one of the witnesses that he came to bid off the farm for *Hall*, and would reconvey it to him on being repaid. The farm was, accordingly, bid off by him. A few days after the sale, the plaintiff called on the defendants to have the

agreement reduced to writing. The defendants refused to reconvey unless the plaintiff would pay them the sum they had paid to the sheriff, with the interest, and 300 dollars for their trouble. The plaintiff *told them 300 dollars was a large sum for their trouble, but observed, he knew he was obliged to pay whatever they demanded; upon which, one of the defendants said, he had been obliged to ride *three or four days* for the money. The plaintiff has paid the amount of the sum demanded; and the question presented is, whether these were not circumstances proper to be submitted to the jury, and for them to determine whether the 300 dollars, or some part of it, was not unjustly extorted from the plaintiff. According to my view of the case, it ought not only to have been submitted to the jury, but is so strongly marked with dishonesty and oppression, that they ought not to have hesitated about the result. Courts and juries ought to discountenance impositions of this kind, which are founded in fraud and immorality. The defendants seek to shelter themselves under the rule, *volenti non fit injuria*; but, in my judgment, it would be a misapplication of the rule to extend it to a case like the present. Could the payment of the 300 dollars be said to be voluntary? The plaintiff had, it is true, imprudently confided in the defendants, and thereby placed himself in their power; at least this was his impression, if we may judge from the declaration made by him at the time. The agreement made previous to the sale was calculated to lull the plaintiff to sleep. It was in evidence that the farm was worth 8,000 dollars; the precise sum paid by the defendants is not stated, but it is fairly to be inferred that it was much short of the value of the farm, and, of course, it was an object of importance with the plaintiff to obtain a reconveyance.

I cannot discover in any part of the case a single circumstance, showing this to have been, in legal acceptance, a voluntary payment of the 300 dollars by the plaintiff, or an assent to its being a reasonable compensation for the defendants' trouble. The instrument in writing set forth was no agreement between the parties, but merely propositions of the defendants with which the plaintiff might comply, or lose his farm. The objection made by the plaintiff to the time of payment related to the reimbursement of the advances to *the sheriff, in satisfaction of the execution. The agreement entered into before the sale, was to repay the money within *four months*; but after the sale, and when the defendants had the plaintiff in their power, they demanded payment in *two months*, and would not extend the time beyond *three*. This was a strong indication of a disposition so to embarrass the plaintiff, as to make it impracticable for him to redeem his farm, especially, when it is connected with the circumstance mentioned by one of the witnesses, that Shultz was *anxious* to bid off the farm, intending, probably, to make a speculation out of it. If the agreement to reconvey the

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farm was absolutely void, so that the plaintiff was without remedy, it would, in my opinion, strengthen his claim to recover back the money unjustly extorted. Had the defendants purchased the farm at auction, without having made any previous agreement to reconvey, the case would have been very different. It was in the plaintiff's power to have procured some other friend to purchase in the farm for him, had he not reposed confidence in the defendants; for it appears that Mr. Swart had actually engaged a person to do it, in case the defendants should not attend the sale. Shultz, in making the purchase, evidently considered himself as acting for the plaintiff, for he expressly declared that he came for the purpose of bidding off the farm for Hall, and the true question between the parties appears to me to be, what compensation the defendants are entitled to for their services. Had the jury passed upon this question, and determined that 300 dollars was no more than a reasonable compensation, it would not, perhaps, be proper to disturb the verdict, although it might be thought an extravagant allowance for three or four days' service, this being all the trouble the defendants pretended they had taken about the business, until after the suit was commenced against them, when they attempted to magnify their claim by setting up a pretence that they had had to ride night and day to get the money; but they even then acknowledged that 300 dollars would be a large sum for their trouble, *if they could have such opportunities *often enough*. It is to be hoped, however, their *opportunities* will not be very frequent, for it is a business not deserving of much encouragement.

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A recurrence to two or three adjudged cases will show to what length the remedy here sought has been carried. In the case of *Astley v. Reynolds*, (2 Stra. 916.) the plaintiff, having pawned some plate to the defendant for 20 pounds, at the end of three years came to redeem it; the defendant demanded 10 pounds as the interest; the plaintiff tendered him 4 pounds, knowing that to be more than the legal interest; but the defendant refusing to accept it, the plaintiff, on a second application and refusal, paid the 10 pounds, and then brought his action to recover back the surplus beyond the legal interest. Upon which the court said, this was a payment by compulsion. "The plaintiff might have such an immediate want of his plate, that an action of trover would not answer. Where the rule *volenti non fit injuria* is applied, it must be where the party had his freedom of exercising his will, which this man had not. We must take it he paid the money, relying on his legal remedy to get it back again."

So in the case of *Smith v. Bromley*, (Doug. 696. note.) Lord Mansfield said, if a man makes use of what is in his own power, to extort money from one in distress, it is illegal and oppressive; and it being iniquitous and illegal thus to take money, therefore it was so to detain it. Mr. Evans, in his valuable ap-
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pendix to *Pothier*, (2 *Poth.* 378.) observes, that there is no subject in its nature more wholly referable to the general rules of natural justice, than that of reclaiming money unduly paid. In the leading case on this subject of *Moses v. Macferlan*, (2 *Burr.* 1012.) Lord *Mansfield*, in giving an exposition of the grounds and nature of the action for money had and received, states several principles, which have ever since been looked upon as the standard of authority, even by those who think that in their application to that case, he *did not allow sufficient consequence to other principles, by which they ought properly to have been restricted and controlled. He there observes, that this kind of equitable action to recover money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It is only for money which, *ex æquo et bono*, the defendant ought to refund. It lies for money got by imposition express or implied, or by extortion or oppression, or an undue advantage taken of the plaintiff's situation. In one word, the gist of this action is, that the defendant, upon the circumstances of the case, is obliged, by the ties of natural justice and equity, to refund the money. These principles are derived from the juridical wisdom of the civil law, and are founded on the immutable rules of justice and moral honesty; and, in my opinion, apply with full force to the case before us.

I am, accordingly, of opinion, that the nonsuit ought to be set aside, and a new trial awarded.

KENT, Ch. J., VAN NESS, J., and YATES, J., concurred in the opinion delivered by SPENCER, J.

Rule refused. (a)

(a) If a person pay money to another voluntarily, with full knowledge, or full means of knowledge, of all the facts of the case, the party so paying cannot recover it back again in *assumpsit*, on account of his ignorance of the law. *Waite v. Leggett*, 8 *Cow.* 195. *Clarke v. Dutcher*, 9 *Cow. Rep.* 674. Where a payment has been made, not with full knowledge of the facts, but only under a blind suspicion of the case, and it is found to have been paid unjustly, the party paying may recover it back again. *Per Ashurst, J., Chatfield v. Paxton*, 2 *East*, 471, n. But where one pays money under misapprehension of facts as well as law, and not under mere mistake of the law alone, he may recover it back. *Mowatt v. Wright*, 1 *Wend.* 355. Money lost at gaming, and voluntarily paid, cannot be recovered back in *N. Carolina*. *Stovell v. Guthrie*, 2 *Hayer*, 297. *Hodges v. Pitman*, 2 *Car. Law. Rep.* 394. Where part payment has been made of a debt, and afterwards the creditor sues and recovers judgment by default for his whole debt, without making any allowance for such payment, the judgment debtor cannot afterwards maintain an action to recover back such payment; his remedy is, to obtain a new trial in the original action. *Tilton v. Gordon*, 1 *New Hamp. Rep.* 33. Nor after an action is tried, and judgment rendered, can the defendant maintain *assumpsit* for money had and received, on the ground that he had made certain payments which were not allowed in the former action. *Loring v. Mansfield*, 17 *Mass.* 349. The action of *assumpsit* is a liberal action and will be sustained in all cases where, by the

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ties of natural justice and equity, the defendant ought to refund the money paid to him; but where the defendant may with a good conscience receive the money, and there was no deceit or unfair practice in obtaining it, although it was money which the party could not recover by law, the action has never been so far extended as to enable the party who paid the money voluntarily to recover it back. *Morris v. Tarrin*, 1 *Dall.* 148. *Bogart v. News*, 6 *Serg. & Rawle*, 369. *Irvine v. Hanlon*, 10 *Serg. & Rawle*, 219.

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*B. LIVINGSTON against C. C. ROOSEVELT and C. I. ROOSEVELT.

THIS was an action of *assumpsit*. The plaintiff declared on a promissory note, dated April 26, 1805, drawn by the defendant C. I. R. payable to C. C. Roosevelt & Co. and endorsed by the said C. I. R., in the name of C. C. R. & Co., to the plaintiff, who resides in the city of New-York.

When the note became payable, it was regularly protested for non-payment, and notice given to C. C. Roosevelt.

A judgment by default was entered against C. I. Roosevelt. The other defendant, C. C. R., pleaded *non assumpsit*. The cause was tried at the New-York sittings, in December, 1807, before Mr. Justice Spencer.

The defendants, in February, 1803, entered in copartnership in the city of New-York, and published, for two weeks successively, in the "*Evening Post*" and "*American Citizen*," an advertisement, that they had entered into partnership in the sugar refining business, under the firm of C. C. Roosevelt & Co., and that their sugar-house was in Thames street. Both these newspapers were taken by the plaintiff *during the time of the advertisement. The copartnership continued until June, 1805, when it was dissolved, and notice of the dissolution was given in the same newspapers. The note in question was given for 20 pipes of brandy, purchased of John G. Bogert, agent for the plaintiff, and which were in the hands of Bogert, as administrator of Anthony Carroll, deceased, and were sold in part satisfaction of a debt due from that estate to the plaintiff. The bill of parcels of the brandy, with the contents, the number and mark of each pipe, was made out by a clerk, in the name of C. I. Roosevelt only. The brandy was entered at the custom-house, in the name of C. I. Roosevelt; and to obtain the usual debenture, the plaintiff made oath at the custom-house, that

In 1803, A. and B. entered into partnership as sugar refiners, and published in two of the gazettes printed in the city of New-York, (and which were taken by C.) that they had entered into partnership in the sugar refining business, under the firm of A. & Co. In April, 1805, B., without the knowledge or consent of A., purchased a quantity of

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brandy of C., for which he gave his individual note payable to the firm, and endorsed by him with the name of the firm. The bill of parcels, by the direction of B., was made out in his name only, and the brandies were shipped to the West-Indies, in a vessel belonging to B., and

on his own account; and C. in order to obtain the drawback, made oath at the custom-house, that the brandy was sold to B. A. & B. had entered the name of the firm at two of the banks in the city of New-York, and B. drew checks, and made and endorsed notes in the name of the firm, which were regularly paid, and the banks had considered A. & B. as general partners. C., when he sold the brandy, required the partnership security, and it did not appear that he knew of the limitation, until after its dissolution in June, 1805, notice of which was also published in two of the newspapers.

It was held that the copartners were not liable on the note.

Where a person takes a partnership security from one of the partners, for what is known, at the time, to be a particular debt of the partner who gives the security, the copartnership is not liable. (a)

Where there is a special or limited partnership, in any particular trade or business, one partner cannot bind his copartner, by any contract not connected with such trade or business. (b) And a knowledge in third persons, of the limited nature of the partnership, will be inferred from circumstances. It seems, that a publication in the gazette, of the nature of the copartnership, at the time of its commencement, is constructive notice to all those who may, afterwards, take the copartnership security.

(a) *Leavitt v. Burr*, 1 Wend. Rep. 539, and the New-York cases there cited. *Deb v. Halsey*, 16 Johns Rep. 34.

(b) *Bailou v. Spencer*, 4 Conn. Rep. 163.

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the sale was to *C. I. Roosevelt*. This affidavit was made the 24th *April*, 1805, subsequent to the sale, and before the note was given. The clerk at the custom-house, who attended with the affidavit, testified, that when an article was sold for exportation, as he believed, to a copartnership, it was not uncommon in the affidavit made in order to obtain the debenture, to state, that they were sold to one of the firm, without mentioning the other partners; but whether, in such cases, the sale was in reality made to the firm, or to the individual partner to whom it was stated in the affidavit to be made, he did not know. The brandy was actually exported in a vessel belonging to *C. I. Roosevelt*, and which had been purchased with his own note, without an endorser.

J. G. Lockwood, a witness for the defendant, testified, that, in the spring of 1805, he was employed by *C. I. Roosevelt*, as supercargo, on board the schooner *Elizabeth*, on a voyage to the *West Indies*: this was the vessel purchased by *C. I. R.* as above-mentioned. The cargo consisted of cloves, 20 pipes of brandy, purchased of the plaintiff, and a variety of other articles. *C. C. Roosevelt* had no interest or concern in the vessel or cargo.

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John Y. Cebra testified, that he was a clerk of the defendants from 1804 until the dissolution of their partnership. *On the building where the copartnership business was conducted, was painted, in large letters, "Sugar-House." He knew of no copartnership beyond the limits of the *sugar refining* business. The note in question was given at the dwelling-house of *C. I. Roosevelt*. No entry of the purchase of the brandies was made in the copartnership books, and he understood that it was a private speculation of *C. I. Roosevelt*.

John Cross testified, that he was directed to deliver the brandy by *John G. Bogert*, the agent of the plaintiff; but he received no directions from the plaintiff to make out the bill of parcels, nor did he recollect receiving any from *John G. Bogert*. Neither of them, as far as he knew, ever saw the bill. The bill was made out as *C. I. Roosevelt* directed. *John G. Bogert* directed the witness to call for the note, but gave no directions relative to the form in which it was to be made. He called on *C. I. Roosevelt*, at his dwelling-house, and received the note, and when he handed it to *J. G. Bogert*, no objection was made by him or the plaintiff relative to the form of it.

It appeared, that at two of the banks in the city of *New-York*, the defendants, from the commencement of their copartnership, had been in the habit of keeping partnership accounts, and had been there considered as general partners. That the entry of the partnership name of *C. C. R. & Co.*, in the bank book of signatures, was in the hand of *C. I. Roosevelt*, and that the checks and other partnership paper which passed at the banks were generally signed by *C. I. Roosevelt*, in the name of

the firm; that credit was given at these banks principally to *C. C. Roosevelt*, and that nothing was known, at either of them, of any limitation of the partnership.

The plaintiff proved by several merchants and others, that although they knew of the partnership, they never heard, until after its dissolution, of any limitation, though several of them took the newspapers in which the advertisements were published.

**John G. Bogert* testified, that he was the agent of the plaintiff; that the bargain for the brandies was made with *C. I. Roosevelt*, but he understood they were sold to and for the partnership, although nothing was said on whose account the purchase was made. The partnership engagement was to be given, and the sale was not completed, until he had satisfied himself, by inquiries, that the defendants were partners. He never heard of any limitation to the partnership, until after its dissolution, and he gave no directions to *Cross* to make out a bill of parcels. He believed, when the sale was made, that the partnership was a general one.

The judge told the jury, that he was decidedly of opinion, upon the facts above stated, that the plaintiff was entitled to recover, and the jury, accordingly, found a verdict for the plaintiff.

The defendants moved for a new trial, on the ground of the misdirection of the judge, and because the verdict was against law and evidence. Two points were made:

1. A partnership security was taken for what was known to be the individual debt of one partner.

2. That if the individuality of the debt was not known to the plaintiff or his agent, still, in limited partnerships, one partner has no authority to bind the firm in a transaction out of the scope of the partnership.

Griffin, for the defendant. 1. The partnership of *C. C. Roosevelt & Co.* was special, being expressly limited to the sugar refining business. The note in question was given for brandy, and the purchase made exclusively for the interest of *C. I. Roosevelt*, and without the knowledge of *C. C. Roosevelt*. The plaintiff took a partnership security for an individual debt of one of the partners, *knowing* it to be so. The knowledge of the plaintiff, or his agent, that the security was for the individual debt of *C. I. Roosevelt* is material, and is fully proved by the written documents in the case. The bill of parcels made to *C. I. R.* is a contemporaneous exposition of the understanding of the parties; for it is to be presumed, that if the sale had been actually made to the partnership, the bill would have been made out in the name of *C. C. Roosevelt & Co.* That is the natural and usual course of business. The entry at the custom-house for exportation, and the affidavit of the plaintiff himself, that

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the sale was made to *C. I. Roosevelt*, is strong evidence of the fact. Again, the form of the note is almost conclusive evidence, that the brandy was sold to *C. I. Roosevelt* alone. It is drawn by him alone, and he endorsed the name of the firm. If it was a copartnership debt, this mode of making and endorsing the note could give no additional security. If the name of the firm had been subscribed, as makers, each of the defendants would have been equally liable to the plaintiff.

It was expressly decided in the case of *Livingston v. Hastie and Patrick*, (2 *Caines*, 246.) that a note given by one partner in the name of the firm, for his individual debt, was void as against the firm, and even against a friendly endorser, not knowing on what account it was drawn, where the endorsee himself did not know for what the note was given. The same doctrine was recognized in the case of *Lansing v. Gaine and Ten Eyck*. (2 *Johns Rep.* 300.)

2. But admitting that the plaintiff or his agent did not actually know whether the brandy was purchased for the individual account of *C. I. Roosevelt*, or not, still, in the case of a limited partnership, one partner has no power to bind his copartner for any thing out of the course of their copartnership dealings. The principle on which one partner is made liable for the acts of his copartner, is the implied assent arising from the copartnership; but no assent can be presumed to any contract out of the scope of the copartnership business. Suppose a copartnership between two silversmiths, or shoemakers, could one partner bind his copartner, by giving notes, in the name of the firm, for ships or merchandise? or suppose a partnership between two attorneys, *could one bind the other, by purchasing ships or goods in the name of the partnership? In the present case, the copartnership was expressly limited to a particular manufacture or business. The distinction between general and limited partnerships has been long known and settled. (*Watson on Partn.* 180. 2d ed.) In a general partnership, one partner has an unlimited power to bind his copartner, except by a bond or sealed instrument, or where there is a collusion with a third person to cheat the firm. In a special partnership, if one party uses the name of the firm, in matters out of the scope of the partnership, it not only is an abuse, but a transgression of his power. So a general agent may abuse his authority, and yet the principal be liable; but if a special agent exceeds his authority, his principal is not liable. (3 *Term Rep.* 757. 760.) It is only to act in the course of their particular trade or line of business, that an authority is delegated by partners to each other; and it is only in such transactions that strangers have a right to go on the credit of the partnership funds. (*Watson*, 180. 16 *Vin. Abr.* 242. 1 *Salk.* 126. *Cowp.* 814. 6 *Vesey*, jun. 604. 1 *Esp. Cas.* 29.)

There are two exceptions to the general rule on this subject:
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1st. Where the partner who denies his liability, had an interest in, or derived a benefit from, the contract; 2d. Where due diligence or caution has not been used in informing the world of the nature of the partnership; for the presumption must be, that the partnership is general, unless the contrary has been made known. *C. C. Roosevelt* cannot be brought within either of these exceptions; he knew nothing of the purchase of the brandy, which was made solely and exclusively for the benefit of *C. I. Roosevelt*. The defendants did all in their power to make known to the public the limited nature of their partnership. Advertisement in the gazettes is the most usual, and certainly the most effectual, way of making such a fact known. It has been decided, that an advertisement in a gazette is sufficient notice of the dissolution of a copartnership; (2 *Johns. Rep.* 300.) for the same, or a stronger reason, it ought to be considered as sufficient notice of the nature of the partnership.

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**T. A. Enmet*, contra. If there is evidence sufficient to justify the jury, in finding their verdict, the court will not disturb it. Mere knowledge of the nature of the partnership, and of its being an individual transaction, is not sufficient; there must be collusion or fraud, and knowledge is only evidence of such fraud. This knowledge ought to be strong and full, not slight or presumptive.

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Sugar refiners must purchase raw sugar; it is not, therefore, improbable, but a fair inference, that the brandy was purchased as an adventure to the *West Indies* on the partnership account, in order to procure the raw materials for the manufactory. The testimony of *Bogert* is direct and positive, that he trusted to the credit of the partnership, and that he thought it a copartnership transaction. *Cross*, who made out the bill of parcels, was not the agent of the plaintiff. He made it out agreeably to the directions of the person who called for it.

There is a material difference between a gazette notice of the dissolution of a partnership, and a notice of its nature and commencement. The former operates immediately; but a notice of the nature or limitation of a partnership which may continue many years, may, in a short time, be forgotten by the world, who only see persons acting together as general partners. These acts obliterate the remembrance of the former notice of the nature of the copartnership, published at its commencement; while the ceasing to act together, serves to confirm the recollection, and to recall the attention to the notice of the dissolution. Persons who commence partnership in relation to a particular business may, afterwards, extend it to some other objects, or to some particular business or adventure, *pro tanto*; and how is the world to know whether they act according to the terms of the original contract or not? The sign affixed to the building where the manufactory was carried on, was no

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notice, for it did not express the nature of the copartnership. There is no evidence that the note was drawn, in the manner it appears to be, by the direction of *Bogert*. He naturally supposed *that it was done so by the desire of *C. C. Roosevelt & Co.*

The true question is, whether there was any collusion between the plaintiff or his agent, and *C. I. Roosevelt*, to defraud *C. C. Roosevelt*. Knowledge of the fact, that the purchase was made for the individual account of *C. I. R.*, and that he pledged the copartnership funds without the consent of his copartner, is essential to prove the covin or fraud. This is the doctrine to be collected from the cases on this subject. (*Watson*, 202. 8 *Vesey*, jun. 540. *Ex parte Bonbonus*. 7 *East*, 210. *Swan v. Steele*.) Suppose a check drawn in the copartnership name on one of the banks, could the payment of the check be contested on the ground that *C. I. R.* had drawn it on his own account, without authority from his copartner? Certainly not; for *C. I. R.* had authority to issue negotiable paper in the copartnership name. If a partner has power to issue negotiable paper in the name of the partnership, such power is unlimited; and it is, *pro tanto*, a general partnership. The person who receives the partnership paper is not bound to inquire, for what account it is given. Again, a partnership is created, or grows by reputation, and, *a fortiori*, an extension of it may be created by reputation. Admitting that the partnership was originally limited, yet by the acts of the parties it may become unlimited. Indeed, there can be no limited partnership, where one party has power to sign and endorse notes with the name of the copartnership. If *C. C. Roosevelt* meant to avoid responsibility on notes not given in the course of the copartnership business, he should have guarded against it, by stipulating that one partner should not endorse notes in the name of the firm.

Whether the partnership be general or special, one partner has no authority to bind his copartner for any thing not connected with the copartnership business. But the only question is, whether there was fraud or covin; the *English* decisions go on the ground of fraud, (1 *East*, 48. 2 *Esp. Cas.* 524.) and the jury are the proper judges how far fraud is made out by the evidence.

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**Harison*, in reply. If fraud invalidates the security which has been taken, and knowledge in the party receiving it is evidence of that fraud, it must be conclusive evidence. It is the duty of every person who takes paper signed or endorsed by a copartnership name, to inquire and know, whether the party who gives it has authority to sign the name of the firm. If, from all the evidence, the jury ought to have inferred that the plaintiff or his agent did know that the note was given and

endorsed for the individual debt of *C. I. R.*, the verdict ought to be set aside.

That the brandy was purchased to send to the *West Indies*, to be converted into raw sugar for the use of the copartnership, is an idea not warranted by the evidence. The written evidence in this case ought to outweigh the testimony of *Bogert*, the agent, who may naturally be supposed to have some bias in favor of his principal. The making out of the bill of parcels in the name of *C. I. R.* was a sufficient intimation to the plaintiff's agent, that the purchase was for the individual partner, and he ought to have inquired of *C. C. R.* whether he consented to give the note. The peculiar manner in which the note was drawn was of itself sufficient to put *Bogert* on the inquiry, as to its being a copartnership transaction; and the oath of the principal at the custom-house, that the sale was to *C. I. R.* ought to be held conclusive evidence of the fact.

If an advertisement in a gazette is sufficient evidence of the dissolution of a copartnership, it ought to be evidence, also, of its limited nature. The transactions at the bank were perfectly consistent with a limited partnership. Reputation is *prima facie* evidence only of a partnership, but it must be connected with acts to establish the fact. Mere reputation is not enough to create a partnership; if it were, it would be easy for one man to make another liable, as a partner, without his knowledge or consent.

In the case *ex parte Bonbonus*, (8 *Vesey*, jun. 540.) the lord chancellor said, "that if, under the circumstances, the party taking the paper could be considered as advertised, in the nature of the *transaction, that it was not intended to be a partnership proceeding, it should not bind them." The nature of the purchase, in the present case, and the circumstances attending it, were certainly sufficient to advertise the plaintiff or his agent, that this was not a partnership transaction.

If the doctrine contended for, on the part of the plaintiff, should be established, there must be an end altogether of limited partnerships. In every partnership, each partner must be authorized to use the name of the firm, in relation to the copartnership business. If the parties were to agree that they should sign their names separately, this would not be binding on third persons; and if one partner should use the name of the firm, in the course of the partnership business, the partnership would be bound, though done in violation of the agreement between the partners.

VAN NESS, J. Whether the plaintiff knew that the debt for which he received the partnership security was the private debt of *Cornelius I. Roosevelt*, is a question of fact, and we are called upon to decide whether, if that question had been sub-

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mitted to the jury, they ought not to have found for the defendant. The partnership was special, being limited to the sugar refining business in the city of *New-York*, where all the parties resided. At the time the partnership was formed, notice was given for two weeks successively, of the nature and extent of it, in two daily papers, published here, both of which the plaintiff took during that period. The house where the business was to be transacted was designated in the notice, and "Sugar-House," in large letters, was painted upon it. The defendant *Cornelius C. Roosevelt* at no time consented, or was privy to any extension of the connection, beyond the particular object for which it was originally formed. The article sold, and which was the consideration of the note in question, had no relation to the business of sugar refining, and it would, therefore, never have occurred to any one, that *Cornelius I. Roosevelt* purchased it on the partnership *account, unless he had expressly declared that to be his intention. There was nothing, either in the acts or declarations of *Cornelius I. Roosevelt*, from which the plaintiff's agent could infer, that he bought the brandy for the use of the company. The contract was made with *Cornelius I. Roosevelt*, without the knowledge or consent of his copartner. He gave his note at his own house (and not at the counting-house of the company) for the payment of it, with the endorsement of the firm, as collateral security; and the note, in this form, was received by the plaintiff, without objection. The manner in which the note was drawn is inconsistent with the idea of a sale to the firm. It is not hazarding any thing when I say that, where a sale has been made to partners, it would be a perfect novelty among merchants to receive the note of one of them endorsed by the firm. There could be no possible use in it. No additional security was derived from its being given in that form. After the contract for the sale, but before the delivery of the note, the plaintiff himself (and this is the only instance of his personal agency in the whole transaction) made oath at the custom-house, that the sale was made to *Cornelius I. Roosevelt*; thus giving the highest, most solemn, and satisfactory evidence of his understanding of the sale, at the time when it was made, and which is in exact coincidence with all the documentary and other evidence in the cause, even with that of Mr. *Bogert*, which I shall presently notice. Upon this evidence, I am persuaded, the jury would have found, that the sale was made to *Cornelius I. Roosevelt*, in his individual capacity; that this was known to the plaintiff; and, consequently, that, originally, he only was liable for the payment of it. This court has often decided, that one partner cannot pledge the partnership security for what is proved to be the separate debt of such partner, without the consent or privity of the other partners. (*Livingston v. Hastie & Patrick*, 2 *Caines*, 246. *Lansing v. Gaine & Ten Eyck*, 2 228

Johns. Rep. 300.) In the case of *Dubois v. Roosevelt*, decided in May term, *1808, and which is not reported, (a) the facts were almost precisely similar to those I have above stated. The

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(a) The court thought that case so precisely similar in principle to that of *Livingston v. Hastie & Patrick*, that it was not deemed important to report it; but since it has been referred to, it is thought proper to subjoin the following account of the case:

DUBOIS against C. C. ROOSEVELT and C. I. ROOSEVELT.

THIS was an action of *assumpsit*. The plaintiff declared on a promissory note, dated the 27th April, 1805, drawn by the defendant C. I. Roosevelt, payable to Cornelius C. Roosevelt & Co. and endorsed by C. I. R. with the name of C. C. R. & Co. A judgment by default was entered against C. I. Roosevelt, and the other defendant pleaded *non assumpsit*. The cause was tried at the New-York sittings, in June, 1807, and a verdict was taken for the plaintiff, by consent, subject to the opinion of the court, on a case, containing the following facts:

On the 3d of February, 1803, the defendants entered into a copartnership in the sugar refining business, in the city of New-York, where the plaintiff also resided, and the following advertisement was inserted in the "Evening Post" and the "American Citizen," two newspapers published in the city. "Copartnership. Cornelius C. Roosevelt and Cornelius I. Roosevelt have entered into partnership, in the sugar refining business, under the firm of Cornelius C. Roosevelt & Co. Have ready for sale, loaf and lump sugar of a good quality, also molasses, at their sugar-house in Thames street, in the rear of the City Hotel."

The copartnership was dissolved in June, 1805, and public notice of the dissolution given.

In April, 1805, the plaintiff sold to C. I. Roosevelt a quantity of beef, the bill of which was made out in the name of C. I. Roosevelt, and his own note, without any endorser, was received for the amount. A short time afterwards, the plaintiff sold to C. I. Roosevelt a quantity of cloves, for which, by agreement, he was to give his note, with a good endorser. The cloves were purchased by C. I. Roosevelt, on his own account, and the bill of parcels was made out in his own name only. The note in question was drawn by C. I. Roosevelt, and endorsed by him, in the name of the firm, and given for the cloves to the plaintiff. The note was protested for non-payment, and due notice thereof given to the defendants.

The defendant Cornelius C. Roosevelt was in no manner interested in the purchase of the cloves, which were purchased for an adventure, in which he had no concern. They were exported in the name of C. I. Roosevelt, and in order to obtain the usual debenture, the plaintiff made oath at the custom-house, that the sale was to him.

It appeared that the business of the partnership was principally transacted by C. I. Roosevelt, and that he made notes issued for the sugar refining business, and signed the name of the copartnership. The plaintiff sent a clerk to the counting-house of the defendants for the note, and the same was received from C. I. Roosevelt, at the counting-house of the firm, which was in the building where the copartnership business was carried on. On the outside of the building was a sign painted in large letters: "Sugar-House," and "Cornelius C. Roosevelt & Co.'s Office."

It was admitted that there was no fraud or collusion on the part of the plaintiff; but that his intentions were fair, and his conduct *bona fide*.

Brinkerhoff, for the plaintiff, attempted to distinguish this case from those of *Livingston v. Hastie & Patrick*, (2 Caines, 246.) and *Laussing v. Gaine & Test Eyck*, (2 Johns. Rep. 300.) and admitted, that unless the case could be distinguished from them, the plaintiff must fail. In those cases, the action was against the makers; here it is against the endorsers, which precludes any inquiry into the original transaction on which the note was founded. He observed, that the cases decided in England went on the ground of fraud and collusion between the parties, and in the present all intention of fraud was negatived. He cited the case of *Swan and others v. Steele*, (7 East, 210.) in which Lord EL-

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court, in that case, were unanimously of opinion, that the *plaintiff could not recover, without overruling the principles laid down in *Livingston v. Hastie & Patrick* and *Lansing v. Gaine & Ten Eyck*. The only difference between these *two cases and the present, is that which may be supposed to arise out of the evidence, that the defendants were considered to be general partners at two of the banks, and by several merchants in this city, who were witnesses on the trial, and the testimony of *John G. Bogert*, the plaintiff's agent. As to the first, if mere reputation is sufficient to enable one of several special partners, to charge another in a case circumstanced as this is, then there is an end, as to third persons, of all limited partnerships. In point of fact, here was not a general partnership. Of this, notice was given in a manner best calculated to apprise the community of it. What other precautionary measure could the defendant have taken? After this notice, not a single act at any time appears to have been done by *Cornelius C. Roosevelt*, from which a well founded reputation of a general partnership could have originated. Besides, this reputation, at most, is but presumptive evidence of a general partnership, and the force of this is completely destroyed by direct and positive proof that the partnership was limited to a particular object. Next, as to the testimony of *Bogert*, which was much relied upon.

On a critical examination of his evidence, it will, I think, be found to operate against the plaintiff. He says, in the first instance, that he understood the sale of the brandy to be "to and for the partnership;" but he adds immediately afterwards, "that nothing was said on whose account the purchase was made;" but "that the partnership security was to be given for it." He goes on to state, "that the sale was not completed until he had

Ellenborough held, that where a person *bona fide*, and without any fraud, receives a note endorsed by one of several partners, in the name of the firm, it should bind all the partners.

Griffin and *Harison*, contra, relied on the case of *Livingston v. Hastie & Patrick*, and that of *Lansing v. Gaine & Ten Eyck*, as precisely in point. They contended, that the case of *Swan and others v. Steele* was in favor of the defendant, as Lord *Ellenborough* recognized the principle, that where a person takes the copartnership firm, as security for the individual debt of one partner, knowing that it was without the consent of the other, it is fraudulent and void. Knowledge of the fact of its being out of the copartnership business, or not, made all the difference. They cited 1 *Salk.* 126. *Cowper*, 814. 6 *Vesey*, jun. 604. 1 *Caines*, 184. *Watson on Partnership*, 2d ed. 180.

Hoffman, in reply, was stopped by the court, who seemed to think, that there was no difference between this case and that of *Livingston v. Hastie & Patrick*. *Hoffman* said he should decline arguing the cause; for unless the court thought the distinctions taken by *Brinkerhoff* were well founded, the plaintiff could not prevail.

Per Curiam. We are of opinion that this cause is clearly within the principle decided in that of *Livingston v. Hastie & Patrick*, and that the plaintiff must be nonsuited.

Judgment of nonsuit.

satisfied himself *by inquiries*, that the defendants were partners." Now the fact stated by *Bogert*, that the partnership *engagement* was to be given, is the only one from which it can be inferred, (for he no where says so in express terms) that *he* even supposed the sale was made to the company; and when we see *how* that was in fact given and received, without objection, and take into view the other facts in the case, the fair conclusion is, that he considered the contract as made *with *Cornelius I. Roosevelt*, individually, and that all he was solicitous about, was to obtain the partnership security for the payment of it. If *Bogert* really conceived this to be a sale to the firm, is it not very singular that he never came to an explanation to that effect with *Cornelius I. Roosevelt*? Yet it does not appear, that during the whole negotiation, a syllable was uttered as to whom, or on whose account it was made; and this is the more surprising, when it appears that he made *inquiries* to satisfy the doubts and suspicions which he entertained of the existence of a partnership *at all*. Why, when making these inquiries, did he not apply to *Cornelius C. Roosevelt*, whose security he wished to obtain, and who was the only one able to give him correct information? I confess that I am not satisfied with this testimony; and, after a careful review of all the circumstances, I cannot perceive how the jury could avoid saying that the plaintiff made the sale to *Cornelius I. Roosevelt*, in his private capacity; and that the debt, for which the endorsement of the firm was taken, was his private debt, contracted without the concurrence of *Cornelius C. Roosevelt*, expressed or implied: and if they had so found, it is conceded, that the partnership security, as against *Cornelius C. Roosevelt*, in judgment of law, is fraudulent and void.

But there is another equally fatal objection against the plaintiff's right to recover.

The distinction between *general* and *special* partnerships is probably coeval with their existence. A general rule applicable to both is, that in transactions relating to the joint concern, one of several partners may bind the rest. He may sign notes, endorse or accept bills for the common benefit, &c., without applying to the rest in every particular case. But this authority of a single partner has its limitation. Formerly, as appears by the case of *Parkney v. Hall*, (1 Salk. 126. and S. C. 1 Ld. Raym. 175.) it was probably less extensive than at this day. One partner of the concern has no authority to pledge the partnership goods for his own debt, nor can he bind the firm to any *engagements known at the time to be unconnected with, and foreign to, the partnership. This has not only been so settled by this court, but now is, and always has been, the established law in *England*. Not an adjudged case, nor, I believe, a single *dictum*, can be found the other way. This will appear from most of the cases which I shall presently have occasion to

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mention for another purpose. In *special partnerships*, however, this power of the individuals composing them, is restricted to still narrower limits, and can only be legally exercised within the compass of that particular business to which the partnership relates. It is as circumscribed as the partnership itself. It is, therefore, analogous to that which is conferred on an agent appointed for a special purpose, who, if he exceed his authority, cannot bind his principal. (*Fenn and another v. Harrison and others*. 3 Term Rep. 757.) This analogy is complete, in all cases, where third persons have dealings with a special partner, with notice that he is such. And, accordingly, it has been repeatedly ruled that, whenever such a partner pledges the partnership funds, or credit, in a transaction which is known to be unconnected with, and not fairly and reasonably within, the compass of the partnership, it is, as to the other partners, fraudulent and void. They, however, to entitle themselves to the protection of this rule of law, must not do, or consent to, or suffer any thing to be done, which may hold them out to the world as general partners; and it would always be prudent and proper (though I will not say it is indispensably necessary) to give public notice to the community, that the partnership is special, and of the particular species of traffic or business to which it is confined. (*Cowper*, 814. *Willet v. Chambers*. 1 Esp. N. P. Rep. 29. *De Berkom v. Smith and another*. 2 Esp. N. P. Rep. 524. *Arden v. Sharp and another*. 1 East, 48. *Shirreff and another v. Wilks*.) In the case, *ex parte Bonbonus*, (8 Ves. 540.) Lord Eldon expresses himself thus: "I agree it is settled, that if a man gives a *partnership engagement* in the partnership name, with regard to a transaction, *not in its nature a partnership transaction*, he *who seeks the benefit of that engagement must be able to say, that though in its nature not a particular transaction, yet there was some authority beyond the mere circumstance of partnership, to enter into that contract so as to bind the partnership; and then it depends upon the degree of evidence." Nothing has been done, in the present case, to impair the claim to the benefit of this rule. The business, as far as it relates to *Cornelius C. Roosevelt*, has been carried on, for aught that it appears to the contrary, conformably to the terms upon which the partnership was formed. He has done no act to countenance a belief, that these terms were different from those specified in the notice. He was a stranger to the purchase of the brandy; he had no agency nor interest in the shipment of it afterwards; it was manifestly an article unconnected with the objects of the partnership; nor was there any thing in the nature of the transaction, or the manner of conducting it, to justify a belief of the contrary. It has, indeed, been urged, that it might have been purchased for the purpose of exportation to the *West Indies*, and of bringing back from thence a cargo of raw sugar, to be refined in *New-York*, on the partnership ac-

count. But the suggestion is not supported by the evidence. The whole transaction wears a different aspect. Suppose this had turned out to be a lucrative speculation. Certainly *Cornelius C. Roosevelt* would have had no claim to a participation in the profits. Therefore, there is no justice in imposing upon him the whole of the loss. Had it been submitted to the jury to decide whether the purchase of this brandy was connected with the business of the partnership, I think they would have decided in the negative.

There is no collision between what I have said and the cases *ex parte Bonbonus*, (8 Ves. 540.) and *Swan v. Steele*, (7 East, 210.) As I understand these cases, they were decided upon the very principles which I have attempted to establish. To borrow money, and to negotiate bills and notes, are as incidental to, and as usual and necessary in, a *special*, as a *general* partnership. Business of this sort falls equally within the scope of the one as the other; and, in the absence of all fraud, the authority of the individual partners to bind the company is the same in both. This is one of the risks common to all kinds of partnerships; and it would be repugnant to commercial policy and convenience, to make any distinction, in this respect, between them. The reason why this would be the tendency of such a distinction is obvious. In all money concerns, and negotiations in commercial paper, there is nothing upon the face of them foreign from a limited partnership; nothing to awaken suspicion or excite inquiry; and if one partner, in the course of business, abuse the special trust in him, innocent third persons might suffer.

My opinion is, that there ought to be a new trial, with costs to abide the event of the suit.

THOMPSON, J., and YATES, J., were of the same opinion.

SPENCER, J. It cannot, I think, be pretended, that in point of fact, the plaintiff knew, when the brandy was sold, that it was on the private account of *Cornelius I. Roosevelt*. Mr. *Bogert* is explicit in his testimony, that the sale was on the credit of the partnership; that he knew of no limitation of the partnership, but, after inquiry, believed it to be general.

The circumstances which are supposed sufficient to render the plaintiff chargeable with notice of the limitation of the partnership, appear to me to be susceptible of easy explanation. From the evidence in relation to the publication in the gazette, considering the lapse of time from the insertion of the notice, and the fact that the plaintiff was not engaged in commerce, with the further fact, that merchants who took both the papers were ignorant that the partnership was special, and had not attended to the notice, my mind is decisively impressed, that the plaintiff cannot be supposed ever to have retained it in his recollection.

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tion. The *bill of parcels and form of the note, which were the acts of *Cross*, ought, on no principle, to excite suspicion, for *Cross* was not the agent of the plaintiff, and, as he has testified, proceeded without any instructions from the plaintiff, or Mr. *Bogert*, in making out the bill and in taking the note. The affidavit at the custom-house was made after the sale by *Bogert*; it is, therefore, impossible that he should have given information to the plaintiff, that the sale was to *Cornelius I. Roosevelt*, contrary to the fact to which he testifies, that the sale was to the firm, and on its credit. The affidavit was substantially true, and ought to be construed in reference to the object to be affected by it.

As it regarded the *United States*, it was perfectly immaterial whether the affidavit stated a sale to one or all the vendees; the object was to identify the goods, and obtain a debenture. I cannot but consider, for the reasons which I have given, that it would be contrary to the facts in the case, to suppose the plaintiff knew that there was a special limited partnership when the brandy was sold, and, with this knowledge, is making an attempt to charge one of the firm for articles sold to the other; it would be neither more nor less than presuming a fraud, without a fact to support it.

The case ought to be tested by other principles; and if on those principles the defendant *Cornelius C. Roosevelt* is not responsible, then the plaintiff must submit to his loss.

I recognize the authority of the cases of *Livingston v. Hastie & Patrick*, and *Lansing v. Gaine & Ten Eyck*, and fully assent to the law, that where a person takes a partnership security from one of a firm, knowing it to be for his private concerns, and disconnected with the objects of the partnership, the other partner is not chargeable, and he is not responsible, in consequence of the collusion and fraud. I hold it to be equally well settled, that if a person, in the course of trade, *bona fide* takes a bill, uninformed that it was given without the knowledge of the other partner, and not in relation to the partnership concerns, whether the partnership be a limited one or general, the whole firm will be *bound. The cases of *Swan and others v. Steele and others*, (7 *East*, 210.) and *ex parte Bonbonus*, (8 *Ves.* 540.) though not authoritative here, justify the position I have made. These cases decide, that a *bona fide* holder of a bill, for a sufficient consideration, and without notice that it was given by one partner for an individual debt not relating to the partnership, might recover against all the partners, though the bill was in fact given by one of them for a debt not relating to the partnership. But whatever might have been the objects of the defendants' partnership, in its inception, it appears to me, that the evidence in the case shows, conclusively, that by their own acts, the reputation that it had become general was well warranted.

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The defendants, from the commencement of the partnership, kept accounts at two of the banks in the city, and had there been considered as general partners ; the entry of the partnership firm was in the hand-writing of *C. I. Roosevelt*, in the name of the firm ; credit was given to the partnership on the responsibility of *C. C. Roosevelt*, and nothing was known, at either of the banks, of a limitation of the partnership business, until after its dissolution. In addition to this, the presidents and cashiers of the two banks, several merchants of extensive business, and brokers, testified, that they knew of the partnership, but never heard of any limitation, until after the dissolution. It cannot be denied, that a special partnership may become general, from the acts of the parties in the conducting of their business, as well as from their specific arrangements. It is impossible to believe that *C. C. Roosevelt* did not know of the mode adopted in carrying on business with the banks, and that he was there regarded as a general partner ; and if he did, then it seems to me to follow, that he aided and assented to his being considered a general partner. It is probable that the reputation of a general partnership proved so fully, and not attempted to be contradicted, had its origin in the mode the defendants adopted in carrying on their business at the banks ; and certainly the authority devolved on *C. I. Roosevelt* to negotiate paper at the banks, warranted the reputation, and renders both the defendants liable. The case seems to consider the plaintiff as the principal, and *Bogert* as the agent, in the sale of the brandy, but I cannot see on what facts this is founded. The legal property of the brandy was in *Bogert*, and the plaintiff was merely a creditor beneficially interested in the proceeds, without any authority to control or direct the disposition of the property. But it is not necessary to scrutinize or enlarge on this part of the case, as it will not change my opinion, be the fact either way.

One of two innocent men must suffer ; I cannot hesitate in saying that the person who has been so incautious in adopting a partner, deficient in prudence or funds, who has given to that partner the management of the concerns, who has stood by, and permitted him to raise money unlimitedly on his credit, by pledging the name of the firm, and who has thus given his aid to the reputation which certainly existed, and on which the credit in this case was given, must be responsible.

KENT, Ch. J. The plaintiff cannot succeed in this case, if the facts warrant the conclusion, that he took a partnership security for a debt which he actually knew, at the time, was the private debt of the particular partner. Nor can he succeed, if this actual knowledge be not made out, provided the subject matter of the contract, and the nature and circumstances of the copartnership were sufficient to charge him with constructive or legal notice of the fact. Believing these propositions to be

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correct, I shall examine the case to see if, according to them, the plaintiff can be permitted to retain the verdict.

1. The law is well settled, that if a person takes a partnership security from one of the partners, for what is known, at the time, to be the particular debt of the partner who gives such security, the copartnership is not holden. The cases in this court of *Livingston v. Hastie & Patrick*, and of *Lansing v. Gaine & Ten Eyck*, (2 Caines, 246. 2 *Johns. Rep. 300.) were decided upon this ground; and the cases in the English courts of *Arden v. Sharpe & Gilson*, *Shirreff v. Wilks*, and the case *ex parte Bonbonus in chancery*, (2 Esp. Rep. 524. 1 East, 48. 8 Vesey, jun. 540.) all recognize the same principle. The knowledge in the creditor, that the partnership name is given for the individual debt of one partner, renders the transaction fraudulent and void in respect to the copartnership. In the present case, the jury were told, that by law the plaintiff was entitled to recover. According to my view of the case, it ought to have been observed to the jury, that the weight of evidence was in support of the allegation, that the plaintiff understood, at the time, that he was contracting a debt with *Cornelius I. Roosevelt*, in his individual capacity, and that, therefore, the plaintiff was not entitled to recover. Let us cast an eye over the material facts.

The note in question was given for 20 pipes of brandy, sold to *C. I. Roosevelt*, and there is no evidence in the case, that *Cornelius C. Roosevelt & Co.* ever dealt in the article of brandy, or carried on any business in the grocery line, or were concerned generally in trade. There was no evidence that the firm ever held themselves out to the world, as being engaged in any other concern than the sugar refining business, nor that they ever did in fact step beyond that limited concern. The plaintiff was then unauthorized to conclude, that this purchase was upon a partnership account. *Prima facie*, it certainly was not, and it lay with him to show what color he had for a contrary inference, and if he has shown none that is reasonable, he is not well founded in his attempt to charge this debt upon the firm.

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The intrinsic circumstances of the transaction are sufficient to show, that the plaintiff knowingly dealt with *C. I. Roosevelt*, in his private capacity, and there can be no doubt but that, as a matter of fact, the purchase of the brandies was on the separate account of *C. I. R.*, and that the partnership was not interested in the purchase. The brandy was not only purchased by *C. I. Roosevelt*, but shipped by him *for the *West Indies*, on board a vessel owned by him individually, and with other goods purchased and shipped by him on his private account. He drew this note, in his own name, for the purchase money, in favor of the company, and then endorsed the name of the firm, and delivered the note, so endorsed, to the plaintiff. What can

be plainer than the language of this fact, that the note was drawn, and received for a private debt, and that the firm was only given as a security? Was it ever known before, that one partner contracting a debt, in behalf of the copartnership, took this circuitous mode to give the note of his house? There could be no possible use in it, and merchants are not accustomed to take such indirect methods in doing business, without a motive. If it was understood to be the proper debt of the company, why was the individual partner bound directly and absolutely for the money, and the company only contingently, in the character of endorers? Why did the plaintiff, when he sold to a company, take upon himself the burthen of making the first demand, at the precise time of payment, upon the individual partner, and of then using due diligence in giving notice so as to fix the endorers? And, lastly, why did the partner himself assume the responsibility of being first singly answerable for the debt, and of being obliged to pay it, or to lose his credit before the company were resorted to? These questions cannot be answered, as it strikes me, but upon the supposition, that the seller, as well as the purchaser, understood that the sale was on a private, and not on a partnership account. The agent of the plaintiff sufficiently explains, why the note was taken in this shape, when he says that "the partnership engagement was to be given for the brandies."

There are other facts which go to prove that the brandies were understood to be sold to *C. I. Roosevelt*, and not to the company. The note was called for and given at the dwelling-house of *C. I. Roosevelt*, not at the counting-house of the firm; the bill of parcels was made out in the name of *C. I. Roosevelt* only; the brandy was entered at the custom-house in his name, and the plaintiff *made oath there, that the sale was to *C. I. Roosevelt*. This last fact ought to have great weight in forming our conclusions upon the transaction. The affidavit was made before the note was given, and when the intention of the parties must have been well understood and recollected. It was a solemn act, in which we must suppose, that the fact of the sale, and to whom, was stated with caution and precision. It was made by a person who was perfectly competent to scrutinize and feel the force and import of expression, and who must have distinguished quickly and accurately between a sale to an individual, and a sale to a mercantile company. The affidavit is conclusive, that the plaintiff did not then understand there was any other purchaser than the single individual, and he must have obtained his knowledge of the sale, either from his own view of the act, or from the information of his agent. It appears then to me to be a consequence not to be resisted, that the note was drawn in the shape which we see it, in order to obtain the security of the firm to a debt, which both the contracting parties knew to be the proper debt of the single partner.

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'The written testimony, from which this conclusion is drawn, weighs much more in the scale of evidence, than the parol testimony (even if opposed to it) of the agents of the plaintiff, given two years and a half after the transaction took place. *John Cross* says, that the bill of parcels was made out as *C. I. Roosevelt* directed, and that he received no directions from the plaintiff, "nor does he recollect" receiving any from *John G. Bogert*, his agent, to make out the bill; that *Bogert* directed him to call for the note, "*but gave him no directions relative to the form of it;*" and when it was delivered, neither *Bogert* nor the plaintiff made any objection to the form of it. This negative testimony then proves nothing. *Bogert* was the principal agent of the plaintiff in the transaction, and he says that he understood the purchase was on a partnership account, although he declares that "*nothing was said relative to whose account the purchase was made.*" It was then a latent inference which he had no authority to draw; and it is a little remarkable, *that if it was understood from the beginning to be a partnership purchase, that the agent should say, "*that the sale was not completed until he had satisfied himself by inquiries that the defendants were partners, and that the partnership engagement was to be given for the brandies.*" The construction which I give to this parol testimony goes in confirmation of the written proof; and even if any part of it should be deemed repugnant, it cannot be compared to the former, either in judgment of law, or in its power to produce conviction.

There is one circumstance in the case not well explained. It states, that the sale of the brandies was made by *Bogert*, as agent of the plaintiff. This fact appears to be conceded throughout the case, and *Bogert* himself testifies, that he acted as the plaintiff's agent; and yet it is further stated, that the brandies were in the hands of *Bogert*, as administrator of one *Anthony Carroll*, deceased, by whom the brandies were imported, and that they were sold in part satisfaction of a debt due from that estate to the plaintiff. It is possible, that *Carroll* and the plaintiff had been concerned together as partners in importing the brandies, or that *Carroll* acted nominally as owner, and really as agent of the plaintiff, on whose capital the business was conducted, for the affidavit of the plaintiff at the custom-house (and which was made to obtain the usual debenture) must have been in the character of purchaser from *Carroll*. But without being able to solve this fact, it is sufficient to observe, that upon this case, the court must consider the plaintiff as the real vendor of the brandies, whatever may have been the form which the title had previously assumed. He was considered by all parties, both at the trial, and upon the argument, as the vendor, and he took the note, as *principal*, for a debt due to him from *Roosevelt*. The question of notice, therefore, applies to him as an original party to the sale, and

though he may have chiefly effected the sale and took the note by means of *Bogert*, his agent, yet in all such cases notice to the agent is notice to the principal.

*I am, therefore, of opinion, upon the first point, that the verdict is against evidence. The inevitable inference from the testimony appears to me to be, that the plaintiff or his agent actually knew that the purchase was not a partnership concern, and that they required a partnership endorsement, by way of security. Instead of a pointed direction in favor of the plaintiff, the justness of this inference ought to have been submitted to the jury.

2. But if the plaintiff did not in fact know that the purchase was made by *C. I. Roosevelt* upon his own account, and acted under the mistaken impression, that it was a partnership purchase, still the firm were not bound by the endorsement, because the facts disclosed amounted to constructive notice, or notice in law. The partnership between the defendants was confined to the sugar refining business. It had nothing to do with the purchase or sale of brandies. The partners had given timely and due notice in the public gazettes, of their limited engagement, and had designated the place where their business was to be carried on. Every precaution was taken, which the nature of the case admitted, to guard the public against misapprehension. If persons were, afterwards, under a mistake as to the confined nature of the partnership, it must have been owing to some dealings of the copartnership, inconsistent with its declared object, or to gross negligence in those persons, in not seeking information at the proper sources. The understanding of particular merchants, that the defendants were general partners, was of no avail, without showing that the house had done some act to mislead, or given some reasonable cause for that impression. But there is no evidence before us, according to my view of the case, that the partnership ever misled the public, by a single act, or transacted any business which had not an immediate connection with its limited concern.

The habit of keeping partnership accounts with the banks, I do not consider as forming an exception to this conduct. That habit was perfectly consistent with their particular and avowed business, and it was, besides, a private matter, not in the way of dealing, and which the public were not to know. The checks and other proper negotiations with the banks were generally, if not entirely, drawn and conducted by *C. I. Roosevelt*, and it does not appear that his partner ever knew of or rectified a single transaction with the banks. What those transactions were, ought to have been explained, and not left, as they are now, by the case, in total uncertainty. Each partner had a power to draw checks, in the partnership name, for the partnership moneys in the bank, because it is incident to every

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partnership, that each partner should have a power to possess and dispose of the partnership moneys and stock. Each partner, in limited, as well as in general, partnerships, can draw checks and give notes ; but it does not follow from thence, that paper given by a partner, on his private account, would bind the firm, because here the authority of the partner fails ; there must, then, be something in the nature of the debt, or in the nature or conduct of the copartnership, to make the other partner responsible. There are cases which go the length of this general proposition, that one partner cannot pledge the partnership funds, nor make a valid partnership engagement for his individual debt. (*Pinkney v. Hall*, 1 *Salk.* 126. and 1 *Ld. Raym.* 175. The cases of *Gregson v. Hutton*, and *Marsh v. Vansemer*, cited in 1 *East*, 49. The opinion of *Le Blanc*, J., in 1 *East*, 55. and of Lord *Eldon*, in 6 *Ves. jun.* 604.) Whether this doctrine can be supported, in cases where the person dealing with the partnership is not chargeable with knowledge of the fact, I am not prepared to say. I believe the *English* law is now understood to be otherwise, and, perhaps, there is no distinction in principle, upon this point, between *special* and *general* partnerships, and that the question, in all cases, is a question of notice, express or constructive. All partnerships are more or less limited. There is no one that embraces, at the same time, every branch of business ; and when a person deals with one of the partners, in a matter not within the scope of the partnership, the intendment of law will *be, that he deals with him on his private account, notwithstanding the partner may give the partnership name, unless there be some circumstances in the case to destroy that presumption. " If," says Lord *Eldon*, (8 *Vesey*, 544.) " under the circumstances, the person taking the paper can be considered as being advertised, that it was not intended to be a partnership proceeding, the partnership is not bound. Public notice of the object of a copartnership, the declared and habitual business carried on, the store, the counting-house, the sign, &c. are the usual and regular *indicia*, by which the nature and extent of a partnership are to be ascertained. When the business of a partnership is thus defined, and publicly declared, and the company do not depart from that particular business, nor appear to the world in any other light than the one thus exhibited, one of the partners cannot make a valid partnership engagement, on any other than a partnership account. There must be some authority, beyond the mere circumstance of partnership, to make such a contract binding. Were it otherwise, it would be idle, and worse than idle, to talk of limited partnerships, in any matter or concern whatever, and the law would be recognizing an association, only to render it a most dangerous illusion to those whom it embraced. Lord *Kenyon* must have understood the capacity of one partner to bind the rest with this restriction, when he observed, in the case of *De Berkom v.*

Smith and Lewis, (1 *Esp. Rep.* 29.) that persons might be partners in a particular concern, and if they did not appear to the world as partners, it should not be sufficient to make them liable in cases not connected with the particular business. The law will presume, in all such cases, that the creditor is *advertised*, that he is not dealing on a partnership account; and for him to take a partnership engagement, without the consent of the firm, is, in judgment of law, a fraud upon the firm. Suppose, in the case of a general commercial partnership, a debt was to be contracted by one partner upon the purchase of new lands; or suppose, in the case of a partnership between two attorneys,* in law business, a partnership note was to be given by one of them upon the purchase of groceries or furniture for his family, it could not be supposed by any one that the company would be holden. These would be plain cases of a fraud practised upon the firm, of which the creditor would be chargeable with notice. When the public have the usual means of knowledge given them, and no means have been suffered by the partnership to mislead them, every man is to be presumed to know the extent of the partnership with whose members he deals.

There are, however, qualifications as to the extent of this doctrine, and some instances occur to me which explain and define its application, and which it may not be amiss to mention.

If negotiable paper of a firm be given by one partner, on his private account, and that paper should pass into the hands of an innocent and *bona fide* holder, as in the case of paper negotiated or discounted at the banks; or if one partner should purchase, on his private account, an article in which the firm dealt, or which had an immediate and direct connection with the business of the firm; in these cases, I should think that a different rule ought to be adopted, and one requiring the actual knowledge of its being a private and not a partnership dealing, to be brought home to the claimant. The circumstances of these cases would take away the intendment of knowledge in the creditor. The endorsee, for instance, of such a note takes it upon the credit of the partnership, and he has no means of knowing, from the paper itself, on what account it was created, and he has a right to presume it was a fair partnership engagement. This is the *English* rule (2 *Esp. Rep.* 524. 731.) in those particular cases. But the present case cannot be taken out of the operation of the general rule. The plaintiff had no just ground to infer, that, when he was selling brandy to *C. I. Roosevelt*, he was dealing with the sugar refining

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company. Considering the circumstances under which the partnership was announced and conducted, he was *chargeable with notice that he was not dealing on a partnership account.

I am, accordingly, of opinion, that the verdict is against law and evidence, and that it ought to be set aside, and a new trial awarded, with costs to abide the event.

New trial granted.

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BAILEY and BOGERT *against* FREEMAN.

THIS was an action of *assumpsit*. The declaration was as follows: "For that whereas before, and at the time of making of the promise and undertaking and the agreements herein after mentioned, the said plaintiffs were joint dealers and partners in trade, under the firm of *Bailey & Bogert*, to wit, at the city of *New-York*, and in the county of *New-York*; and whereas also, at and before the several times herein after mentioned, one *Noel Blanche*, being indebted to the plaintiffs in a large sum of money, to wit, the sum of 381 dollars and 25 cents, on a promissory note, bearing date the 28th day of *September*, in the year of our Lord, 1807, payable sixty days after the date thereof, whereupon, being arrested thereon at the suit of the said plaintiffs, and an execution issued against his goods and chattels, lands and tenements, on the 11th day of *July*, in the year of our Lord, 1808, at the city and in the county of *New-York*, made a certain memorandum in writing, bearing date the day and year last aforesaid, subscribed by him the said *Noel*, and thereby agreed to deliver to the said plaintiffs, by the name and description of Messrs. *Bailey & Bogert*, within six months from the date thereof, fresh and good chocolate, equal in quality to *Caldwell's*, of *Albany*, at a discount of 5 per cent. from the wholesale prices, at which *Calawell's* chocolate, of the same quality, may be selling for at the time of delivery, and to the amount of 392 dollars and 71 cents, with interest, from the 5th day of *May* then last past; and further, that, all the costs, expenses, fees, and poundage, on the execution issued by the said plaintiffs, by the names and description of Messrs. *Bailey & Bogert*, against him the said *Noel Blanche*, being paid by him, the attorney of the said plaintiffs should direct the said execution to be returned *nulla bona*; and whereas also, afterwards, to wit, on the said 11th day of *July*, in the year of our Lord, 1808, at the city and in the county of *New-York* aforesaid, the aforesaid defendant, by a written memorandum or note in writing, at the bottom of the above-described memorandum in writing, so made by the said *Noel*, and bearing date the day and year last aforesaid, and subscribed by him, the said defendant, according to the form of the statute in such case made and provided, *undertook and promised*, and then and there guarantied the performance of the agreement contained in the said memorandum or writing so made, and subscribed by the said *Noel*, and every part thereof, on the part of him the said *Noel*, to be performed at the times, and to the amount therein mentioned, provided the said *Noel*

In an action brought against A., on his guaranty of the performance by B. of his agreement with C., it was held that the declaration ought to state a consideration for the undertaking of A.

Several of the common counts on different contracts may be included in one count, and the plaintiff is not bound to prove all the causes of action, in order to entitle him to recover; but it is enough, if he prove any one of the causes of action, and he will recover *pro tanto*. (a)

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(a) *Nelson v. Swan*, 13 Johns. Rep. 483.

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should, when the same ought to be performed, be then in life, but not otherwise ; and the said plaintiffs aver, that they, confiding in the said promise and undertaking of the said defendant, so by him made in manner and form aforesaid, did, after the making of the said two several memorandums in writing, to wit, on or about the 20th day of *July*, in the year of our Lord, 1808, at the city and in the county of *New-York* aforesaid, direct the said execution, referred to in the said memorandum in writing, so subscribed by the said *Noel*, to be returned *nulla bona*, whereof the said defendant afterwards, to wit, on the day and year last aforesaid, at the city and in the county aforesaid, had notice ; and the said plaintiffs further aver, that the said *Noel* did not, within six months from the date of the said memorandum in writing so subscribed *by him, deliver to the said plaintiffs fresh and good chocolate, equal in quality to *Caldwell's*, of *Albany*, at a discount of 5 per cent. from the wholesale prices at which *Caldwell's* chocolate, of the same quality, was selling, to the amount of 392 dollars and 71 cents, with interest, from the 5th day of *May*, next preceding the date of the said memorandum in writing, so subscribed by the said *Noel*, in manner and form as the said *Noel* thereby agreed and undertook to do, whereof the said defendant, afterwards, to wit, on the 15th day of *January*, in the year 1809, at the city and in the county aforesaid, had notice ; and the said plaintiffs further aver, that the said *Noel*, at the time when the said agreement made by him in the memorandum in writing so subscribed by him as aforesaid, ought to be performed, to wit, on the 12th day of *January*, in the year of our Lord, 1809, was in life, to wit, at the city and in the county aforesaid, and whereof the said defendant afterwards, to wit, on the day and year last aforesaid, then and there had notice, and was required by the plaintiffs to guaranty the performance of the said agreement so made by the said *Noel*, according to the tenor and effect of the said promise and undertaking of the said defendant in that behalf made as aforesaid, yet the said defendant, not regarding his promise and undertaking aforesaid, but contriving, and fraudulently intending, craftily and subtilely, to deceive and defraud the said plaintiffs in this behalf, hath not in any manner guarantied the performance of the said agreement so made by the said *Noel*, but the said defendant hath hitherto refused and neglected, and still refuses, contrary to the tenor and effect of the said promise and undertaking, so contained in the said memorandum in writing, subscribed by the said defendant as aforesaid, and in breach and violation thereof, to wit, at the city and in the county aforesaid : And whereas the said defendant afterwards, to wit, on the day and year last aforesaid, at the city and in the county of *New-York* aforesaid, was indebted to the said plaintiffs in 581 dollars and 25 cents, lawful money of the

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United States of America, for money by *the said plaintiffs, before that time, paid, laid out, and expended for the said defendant, at his special instance and request, and for other money by the said defendant, before that time had and received, to the use of the said plaintiffs, and for other money by the said plaintiffs, before that time, then lent and advanced to the said defendant at his like request, and being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at the city and in the county of *New-York* aforesaid, undertook, and then and there faithfully promised the said plaintiffs to pay them the said several sums of money, when he should be thereto afterwards requested; yet the said defendant, (although often requested, &c.)

There was a separate and general demurrer to each count, and a joinder in demurrer.

Talbot, in support of the demurrer to the first count, contended,

1. That there was no averment of the non-performance of the agreement by *Blanche*.

2. It was not stated that the defendant had, in any manner, become liable to pay any money to the plaintiffs.

3. There was no breach of the agreement stated; and

4. That there was no consideration set forth for the guaranty or agreement of the defendant. The last objection he considered as fatal, and cited *Sears v. Brink*, (3 *Johns. Rep.* 210.) and *Wain v. Walters*, (5 *East*, 10.)

As to the *second* count, he said, that it joined different causes of action in the same count, which could not be done.

Baldwin, contra.

Per Curiam. The fourth objection to the first count is fatal. It is essential in every action on a promise, to state a consideration. The defendant is, therefore, entitled to a *judgment, but the plaintiffs may amend on payment of costs. In regard to the second count, though some doubts seem to be entertained by some of the bar as to its propriety, on the supposition that the plaintiff might be required to give proof of all the causes of action stated in the count, we think it sufficient, and that he would be entitled to recover, should he prove only one of the contracts. There are several precedents in the *English* books of similar counts. (a) The plain-

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(a) See 2 *Saund.* 122. a. In a recent work on pleadings, by *Chitty*, (p. 337.) it is laid down, on the authority of the case in *Saunders*, and several others, that several distinct debts or contracts may be included in one count of this description, and the plaintiff will succeed, *pro tanto*, though he only prove one of such contracts; for if the defendant be indebted for any one cause, it is a sufficient

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tiffs are, therefore, entitled to judgment on the second count but the defendant has leave to withdraw the demurrer and plead, on payment of costs.

Judgment accordingly.

consideration for the promise (which the law raises) of the defendant to pay the money. Sergeant *Williams* recommends the practice of including the common counts in one count, as was done in this case, in order to avoid a useless prolixity in the pleadings, and unnecessary expense. 2 *Saund.* 122. a. n. 2. *Cro. Jac.* 245. *Yelv.* 175. 1 *Brownl. Ent.* 71. 2 *Black. Rep.* 910. *Bunb.* 262. *Impey's Mod. Plead.* 207. 234. 271.

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*THOMPSON against KETCHAM.

Where a note was made in *Jamaica*, payable in *New-York*, it was held that the contract was to be governed by the laws of *New-York*. (a)

Where no place is mentioned in a note at which the money is to be paid, it seems, that parol evidence is admissible to show at what place it was agreed that the money should be paid. (b)

THIS was an action of *assumpsit*. The declaration contained a count on a promissory note in the following words: "I promise to Capt. *Samuel Thompson*, 80 dollars, for value received. *Montego Bay*, April 21, 1807. *Thomas Ketcham*:" and also the money counts. Plea, *non assumpsit*, with notice, pursuant to the statute, that infancy would be given in evidence under the general issue. The cause was tried at the *Ulster* circuit, in *September*, 1808, before Mr. Justice *Van Ness*.

It was proved, at the trial, that the defendant was under 21 years of age when he executed the note. The defendant acknowledged to one of the witnesses of the plaintiff, that the plaintiff lent him the 80 dollars at *Montego Bay*, in the island of *Jamaica*, to pay his bills on shore, and that he did not know what he should have done without the money. The money which the defendant borrowed of the plaintiff was, by agreement, to be paid in *New-York*, on their arrival; and it appeared that both the plaintiff and defendant arrived in *New-York* at the same time.

It appeared, that the defendant was the agent of the owner of a vessel on a voyage from *New-York* to *Jamaica*, and that most of the money he borrowed of the plaintiff was laid out in purchasing necessary articles for the ship.

The judge charged the jury, that as the money was not lent to purchase necessities for the infant, the contract, if made here, could not be enforced, and that the defendant would be entitled to a verdict; but as the contract was made in *Jamaica*,

(a) *Andrews v. Herriot*, 4 *Cow. Rep.* 508, and the reporter's note to that case. *Fanning v. Consequa*, 17 *Johas. Rep.* 511.

(b) *Anderson v. Drake*, 14 *Johas. Rep.* 116.

it must be governed by the laws of that island; and as there was no proof that the laws of *Jamaica* protect infants against such contracts, the plaintiff was entitled to recover. The jury, accordingly, found a verdict for the plaintiff.

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A motion was made to set aside the verdict, and for a new trial.

**Hawkins*, for the defendant. Though the note was made at *Jamaica*, it was payable in *New-York*; and though no time or place for the payment is mentioned in the note, yet it was competent for the plaintiff to show, by parol proof, where it was to be paid. (*King v. Lainden*, 8 Term Rep. 379. *Peake's L. of Ev.* 123. 3d ed.) The evidence offered was positive that the note was to be paid here, and not in *Jamaica*. Then, as the note was payable here, it must be governed by the laws of this state. (*Trustees of Randall v. Rensselaer*, 1 Johns Rep. 94. *Robinson v. Bland*, 2 Burr. 1077. *Champant v. Ranelagh*, Prec. in Ch. 128. 207. *Connor v. Bellamont*, 2 Atkins, 382.)

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Again, the defence of infancy goes to the mode of enforcing the contract. A statute of limitations, in a foreign country, where the contract is made, has been held to be no bar in a suit brought on the contract here. (*Nash v. Tupper*, 1 Caines, 402. *Ruggles v. Keeler*, 3 Johns. Rep. 263.)

It was incumbent on the plaintiff to show, that infancy was not a good defence by the law of *Jamaica*. Where a party intends to avail himself of the laws of a foreign country, he must prove them as facts. (1 P. Wms. 431.) That the common law of *England* prevails in *Jamaica*, might be proved as a historical fact.

Sudam, contra. In the case of *Robinson v. Bland*, the note was made payable in *England*, and so could not be enforced in *France*. The reporter (1 W. Black. 234.) observes, that foreign laws are to be regarded in *England* as varying from the general common law, and not when they contradict a statute. The *lex loci contractus* always prevails, unless there is a reference, in the contract itself, to the laws of another country. (2 Fonbl. 439.) In *Nash v. Tupper*, the court recognizes the distinction between a bar at common law, and a statute bar. The latter goes only to the mode of recovery, and not to the essence of the contract. *Infancy* is a disability, and goes to the essence of the contract itself, and not to the form or mode of enforcing it.

Another question is how, and by whom, the laws of *Jamaica* are to be proved. It seems to be now well settled in this court, as well as in *England*, that the common law of a foreign country may be proved by parol, but not the statute law. (*Kenny v. Clarkson*, 1 Johns. Rep. 385. *Smith v. Elder*, 3 Johns. Rep. 105. *Peake's Ev.* 72. 75. and note. 3d ed. 2 Cranch's Rep. 187.) Courts in *England* do not judicially take notice of the

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laws of other countries, but they must be proved *like other facts. In the case of *Male v. Roberts*, (3 *Esp. Cases*, 168. *Comyn on Cont.* 161. 2 *East*, 260.) where infancy was pleaded to an action on a contract made in *Scotland*, Lord *Kenyon* said, that the contract was to be governed by the law of *Scotland*, but that the defendant was bound to prove what the law of *Scotland* was in that respect; that he would not take it to be a fact, that infancy was a defence in *Scotland*, unless it was made out by evidence.

The personal rights, secured by *magna charta*, may be claimed by *Englishmen* in the colonies; but the municipal laws of *England* do not extend to *Jamaica*, nor is it governed by the statutes of *England*, unless specially named. (4 *Mod.* 222. 7 *Co.* 1. *Calvin's Case.* 2 *P. Wms.* 75. 1 *Black. Com.* 107, 108.) This is not, then, to be proved as a historical fact.

If, instead of the general issue and notice under the statute, the defendant had pleaded infancy, the plaintiff would have replied, that the contract was made in *Jamaica*, and in reference to the laws of that island. The defendant would have rejoined a defence under the laws of that island, or that the contract was not made in reference to the laws of *Jamaica*. It would, therefore, be incumbent on the defendant to prove the laws of *Jamaica*.

Ruggles, in reply, observed, that the time when the note was payable, was an inference of law, and that this might be rebutted by parol testimony, and if parol testimony was admissible, then it was clear that the money was to be paid in *New-York*.

Infancy does not go to the essence of the contract. Where a contract is voidable, it must be avoided by the act of the party. The contract continues lawful, and can only be invalidated by the party himself. In like manner, the statute of limitations must be pleaded, otherwise the plaintiff will recover on the contract. The defendant must be considered as having pleaded infancy, and the replication must have been, that the defendant was not an infant, or that he had promised to pay since he had come of age. By the declaration, the promise is laid in *New-York*.

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*THOMPSON, J., delivered the opinion of the court. The note or instrument given by the defendant, and upon which this suit is brought, is as follows: "I promise to captain *Samuel Thompson* 80 dollars, for value received. *Montego Bay, April 21, 1807.*" The defendant interposed a plea of infancy, and upon the trial proved, that when the note was executed, he was under 21 years of age. The judge at the trial ruled, that to make this plea available, the defendant must also prove, that by the laws of *Jamaica*, where the note was given, infancy would

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have been a bar to the action. From the testimony in the case, it appears, that the note was to be paid in *New-York*, on the arrival of the parties here. No objection was made to such evidence, and it might, on the present motion, be assumed as a fact admitted, without inquiring into the legality of such proof. But I see no objection to such testimony. Nothing appears upon the face of the note, showing it to be payable at any particular place. The evidence was not contradictory to the written contract.(a) The loose and informal manner in which the note is drawn, shows the written contract in some measure imperfect, and all the circumstances in the case corroborate the plaintiff's confession, and afford conclusive evidence, that the money, for which the note was given, was lent with a view to its being repaid on the arrival of the parties in *New-York*. If this, then, is to be taken as the contract between the parties, the case stands precisely on the same footing as if the note had been made in this state. For it is a well settled rule, that where a contract is made in reference to another country, in which it is to be executed, it must be governed by the laws of the place where it is to have its effect. (2 *Burr.* 1078. 1 *Johns. Rep.* 94.)(b) In this view of the case, it is immaterial what were the

(a) This case was subsequently (September, 1810) tried before Mr. Justice Yates, and a verdict taken for the plaintiff, by consent, subject to the opinion of the court upon certain facts stated in the report in 8 *Johnson's Reports*, 146. (2d ed.) Upon the argument, two points were raised for the opinion of the court, by the plaintiff's counsel.

1. That the defendant was bound to show that, by the laws of Jamaica, infancy would be a defence there, to an action on the note.

2. That the parol evidence, which was objected to by the plaintiff, at the (last) trial, was inadmissible.

The court agreed with the counsel for the plaintiff. Ch. J. KENT, who delivered the opinion of the court, observed, "When the operation of a contract is clearly settled by general principles of law, it is to be taken to be the true sense of the contracting parties; and it is against established rule to vary the operation of a writing by parol proof. There is no ambiguity in this case which requires explanation. The note, upon the face of it, was payable immediately, and the parol proof went to alter, in a very material degree, its operation and effect, by making it not payable until some distant and undefined period, when the parties should arrive at *New-York*." In relation to the infancy of the defendant, he observed, "The testimony being rejected, the next question is, which party was bound to know the law of Jamaica. The court cannot know, *ex officio*, what are the rights and disabilities of infants, or when infancy ceases, by the provincial law of Jamaica. These questions depend much upon municipal regulations, and what the foreign law is. The defendant was bound to make out a valid defence, and it, therefore, lay with him to show that his plea was good by the law of Jamaica."

(b) Contracts void by the law of the land where they are made, are void every where else. *Houghton v. Page*, 2 *N. Hampsh. Rep.* 42. *Desobats v. Berquier*, 1 *Bian. Rep.* 336. The personal competency or incompetency of infants to contract, depends on the law of the domicile. *Ex parte Lewis*, 1 *Ves. Rep.* 297. *Male v. Roberts*, 3 *Esp. Rep.* 163. *Thompson v. Ketcham*, 8 *Johns. Rep.* 146. (2d ed.) The incompetency of a married woman to contract, depends also upon the law of the place of the marriage (*Dougherty v. Snyder*, *Ex. 15 Serg. & Rawle*, 84.); and nuptial contracts stand upon the same footing. *Decouche v. Savetier*, 3 *Johns. Cha. Rep.* 190. The discharge also of a contract is governed by the *lex loci*; and consequently insolvency, or bankruptcy, or any other matter

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laws of *Jamaica* on the subject; we must be governed by our own laws, according to which, the defendant's proof was sufficient to bar a recovery against him.

*We are, accordingly, of opinion, that the verdict must be set aside, and a new trial awarded, with leave to abide the event of the suit.

New trial granted.

which discharges a contract where it was made, and the parties were domiciled, discharges it every where. *Blanchard v. Russell*, *Bradford v. Farrand*, 13 *Mass. Rep.* 1. 18. *Green v. Sarmiento*, 1 *Peter's C. C. Rep.* 74. *Le Roy v. Croninshield*, 2 *Mass. Rep.* 151. See *Ingraham's Insolvent Law of Pennsylvania*, 179 *et seq.* (2d ed.) Remedies, however, upon contracts are regulated by the laws of the place where an action is instituted; and, therefore, if the *lex loci* exempt the person merely of a debtor from arrest or imprisonment, he remains liable to arrest for the same debt if he be found in another jurisdiction; as imprisonment is but matter of remedy. *Sicard v. Whale*, 11 *Johns.* 194. *Whittemore v. Adams*, 2 *Cow. Rep.* 626. *Hinckley v. Marean*, 3 *Mass. Rep.* 88. *Woodbridge v. Wright*, 3 *Conn. Rep.* 523. *Wood v. Malin*, 5 *Halst. Rep.* 208

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WOODWARD.

In the matter of JOHN WOODWARD, Gent., one of the
Counsellors, &c.

ON an affidavit presented to the court at the last term, stating, that it was generally reported, and that the deponent believed, that Mr. Woodward was practising in the county of Columbia, as an attorney of this court, in the name of William Miller, Esq., one of the attorneys of the court; and that his name was so used in the case of *Jackson, ex dem. Livingston, v. Sutherland*, then before the court, a rule was granted against Woodward, to show cause, at this term, why an attachment should not issue against him.

It appeared that Woodward was only a counsellor of the court, and not an attorney, and resided at Hudson; and that Miller resided at a place called Johnstown, about 9 miles from Hudson, where he keeps an office, and practises as an attorney and counsellor of this court.

T. A. Emmet, in behalf of Woodward, objected, that the affidavit on which the rule was obtained at the last term, was insufficient. It stated no fact, but merely the belief of the deponent; and was, in every respect, too loose, to oblige the party complained of to be called on to answer.

In the case of the *King v. Willet*, (6 Term Rep. 294.) on a motion for leave to file an information, the Court of King's Bench said, that *they would not grant such a motion but on legal evidence, and such as would support a bill of indictment; that if they were to grant a rule to show cause why an information should not be filed, it would be calling on the party either to give evidence against himself, or leaving the rule to be made absolute on an affidavit which was not legal evidence.

If there was any offence charged, in the present case, it was against the statute concerning counsellors and attorneys; (*Laws*, vol. 1. p. 221. 24 sess. c. 32. *Revised Statutes*, volume 1. p. 109.) by the sixth section of which, it is provided, that if any attorney shall knowingly permit any other person to sue out a writ, or prosecute or defend a suit in his name, the attorney and such person should each forfeit the sum of 50 dollars. An attachment will not lie in such a case, where a penalty is given by statute. (*Barnes*, 27.) An attachment is never granted where there is another remedy, unless that remedy be difficult to obtain. (1 *Comyn's Dig.* 595. Attorney, A. 3.)

Emmet observed, that though he considered these objections as sufficient, yet, as the charge would be fully and satisfactorily answered, he should proceed to show cause. He then read several affidavits, from which it appeared, that on the 5th

A partnership may exist between a counsellor and an attorney, in their professional business; but the attorney must have the sole and entire superintendence of the attorney's business, for which he is responsible; and no person, on the ground of the partnership, can take any part in the conduct of the suit, whose office is in a different place from that of the attorney.

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October, 1808, Mr. *Woodward* and Mr. *Miller* entered into articles of copartnership, as to their professional business, by which it was agreed, that *Miller* should transact all the attorney's business accruing in the office occupied by *Woodward*, and sign all process, papers, and proceedings in the Supreme Court; and that *Woodward* should attend to all the counsel business of the office; that the attorney's business should be under the exclusive direction of *Miller*, and the counsel business under that of *Woodward*; and that such should be the case, should they hereafter find it necessary to have two offices; and that the clerks and students should be under the direction of *Miller*. It appeared, also, that *Woodward* resided and kept his office at *Hudson*, and that *Miller* resided in the town of *Livingston*, but was in the habit of attending at the office in *Hudson* *to give the necessary directions in the attorney's business.

The affidavits contained other facts (which it is unnecessary to state) exculpating the party from any actual or intentional disregard to the practice and rules of the court, or evasion of the statute.

Per Curiam. It appears from the affidavits which have been read, that Mr. *Miller* was employed as an attorney by *Sutherland*, the defendant, in the suit brought against him by Mr. *Livingston*, and that Mr. *Woodward* was employed merely as counsel, and that this was so understood by all the parties; and that the first application to defend the suit was made to Mr. *Miller*. We think sufficient cause has been shown against the rule, from which Mr. *Woodward* must, therefore, be discharged; but the court take this occasion to observe, that if any attorney of this court takes a counsellor into partnership, who is not an attorney, that the attorney must have the whole and exclusive charge and superintendence of the attorney's business, for which he is responsible, so that no person can take any part in the conduct of the suit, on the ground of the partnership, whose office is kept at a different place from that of the attorney.

Rule discharged.

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v.
THE PEOPLE.*P. POWERS *against* THE PEOPLE.

IN ERROR, on *certiorari*. On the 10th *March*, 1805, one *Tarpenning* complained to three justices of the county of *Cayuga*, that *Polly Powers*, the plaintiff in error, had feloniously stolen a handkerchief, the property of the complainant. The accused appeared before the justices, and denied the charge; and, on the oath of three witnesses, she was convicted, and fined 5 dollars.

On the return to the *certiorari*, the case was submitted to the court without argument.

Per Curiam. The principal objection to this case is, that the record does not show sufficient to give the justices jurisdiction. No consent, on the part of the prisoner, has been shown or averred, as to any part of the proceedings. We are to intend that they were compulsory. It ought, then, to have appeared, that she had not given bail after being apprehended, and that she had 48 hours to procure such bail; (*Laws of N. Y.* 24 sess. c. 70. s. 11.) (a) but the complaint was made on the 10th *March*, and she was summoned to appear before the justices, and did appear, and was tried on the same day. The value of the handkerchief stolen ought also to have been stated; for, unless its value was less than 12 dollars and 50 cents, the court had no jurisdiction. It is a salutary rule, with respect to inferior courts, that the cause of which they take cognizance should appear to be within their jurisdiction. These objections are fatal, and the conviction must, therefore, be quashed.

In proceedings under the 11th section of the act "declaring the powers of the courts of general sessions of the peace," &c. the record of conviction before the justices ought to state sufficient to show, that the justices had jurisdiction. The value of the thing stolen ought to be stated, and that the party convicted had not given bail, within 48 hours after being committed, or had consented to a trial before the expiration of that time.

Conviction quashed.

(a) 2 *Rev. Stat.* 711, 712.

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May, 1809.

GAGE
v.
STEWART.

*GAGE against STEWART.

Where a witness is interested in any part of the demand of the plaintiff, he cannot be admitted a witness as to another part.

IN ERROR, on *certiorari*. *Stewart* sued *Gage* in the court below, in trespass, for taking out of his wagon a barrel, containing 10 gallons of whiskey. Upon the trial, *Stewart* offered one *Andrews* as a witness. The defendant objected to his competency, inasmuch as he was the owner of the whiskey, and had sent *Stewart* to bring it. The fact was admitted, and the justice ruled that the witness should not give evidence to the jury as to the whiskey, but confine himself to the barrel. The plaintiff claimed 1 dollar for the barrel, 8 dollars and 75 cents for the whiskey, and 5 dollars for the detention. The jury found a verdict for 9 dollars and 43 cents.

The case was submitted without argument.

Per Curiam. The witness, *Andrews*, as owner of the whiskey, was directly interested; and if a witness is interested in ever so small a part of the demand, he is incompetent. The least degree of interest will disqualify a witness. The plaintiff claimed the whiskey, as well as damages for the detention; and the verdict must have included the whiskey. To allow a witness to testify as to part of a demand, when he is interested in another part, is dangerous and cannot be allowed. The judgment must, therefore, be reversed.

Judgment reversed.

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THE indictment and proceedings in this cause were removed to this court by *certiorari*. The prisoner was indicted at a *special sessions*, held in the city of *New-York*, in *February*, 1809. There were several indictments found against him for grand larceny, to which he pleaded not guilty, and by his consent the same jury were sworn to try them all. After a trial on the first indictment, the jury withdrew to deliberate. During their absence, another prisoner was put upon his trial, and soon after the jury, in the case of the present prisoner, returned into court with a verdict of not guilty. The court, after recording the verdict, proceeded in the other trial in which they were engaged, and the jury supposing, probably, that they were under no further restraint, without being observed by the court or the attorney-general, whose attention was engaged in the other trial, separated, and some of them went into a tavern adjoining the hall, where witnesses and prosecutors usually resort, during the sitting of this court. After the other trial was over, the jury, who had been sworn to try the prisoner, were again called, in order to try the prisoner on the remaining indictments. The counsel for the prisoner objected to the proceeding as irregular, after the jury had separated, and refused to appear, or, under the circumstances of the case, to proceed in the defence of the prisoner against the other indictment. The same jury were then sworn again, but the counsel for the prisoner persisted in the objection, and refused to appear in his defence. The prisoner was then tried, without the aid of counsel, and convicted on all the remaining indictments. On the prayer of the prisoner, his sentence was respited, and he was now brought up to this court on a *habeas corpus*.

Where a jury was sworn and empaneled to try a prisoner, on several indictments, and after giving a verdict of not guilty on the first indictment, they separated and went to a tavern, and then returned into court, when the prisoner was tried by the same jury on the other indictments, and found guilty, this court held the proceedings on the other indictments irregular; but whether the prisoner is to be discharged or a new trial granted? *Quære*.

Sampson, for the prisoner. The trial by jury is justly regarded by the wisest and best of men as the *palladium* of civil liberty. It ought to be kept inviolate, and scrupulously guarded against every encroachment. The very *forms* intended to protect it from innovation are sacred, and not to be dispensed with. (4 *Black. Com.* 350.) After a jury are empaneled, they are to be kept from every communication, and can receive no evidence, except what is produced in court. (*Buller's N. P.* 308.) The oath of the jurors, and of the officer sworn to attend them, shows the caution of the law in this respect. After a jury are sworn in a criminal case, affecting life or member, they cannot be discharged, but must give their verdict. (*Co. Litt.* 227. 3 *Inst.* 110.) They cannot separate, but must be kept

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together, until they agree on their verdict. (*Ld. Delamere's* case, 4 *St. Tr.* 222.) The judges, in *Kinlock's* case, (*Foster*, 16 and 23.) admitted the rule laid down by Lord *Coke*, to be a good general rule, but subject to exceptions; and, in that case, all the authorities which have any bearing on this point, were cited and examined. This is a much stronger case than that of *Kinlock*. [He was stopped by the court.]

Riker, (district attorney,) contra, cited 2 *Hale's P. C.* 294, 295, 296. *Leach*, 706, 707. *King v. Scalbert*. *Kinlock's* case, *Foster*, 38.

Sampson cited 6 *Term Rep.* 638. 4 *Hawk. P. C.* 233. c. 36. § 15. 2 *Caines*, 305. to show that the prisoner ought to be discharged, in case the court should be of opinion that the trial was irregular.

Riker cited *Fries's* case, 3 *Dallas*, 515. as to the power of the court to grant a new trial.

Per Curiam. There can be no doubt that there was an irregularity in this case; the jury ought to have been sworn and empaneled again. We give no opinion, however, whether there ought to be a new trial or not; but shall recommend the prisoner for a pardon.

[The prisoner afterwards obtained a pardon, and was discharged.]

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*The PEOPLE against GEORGE HOWELL.

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AT the last general sessions of the peace, held in the city of New-York, Howell, the prisoner, who was now brought up on a *habeas corpus*, was indicted with one James Mitchell, for forgery. The indictment was for forging "a certain order for the payment of money," and the check was set forth as follows: "*New-York, 27th February, 1809. Cashier of the Merchants' Bank, in the city of New-York. Pay 4,095, or bearer, 685 dollars 20 cents. Benjamin Butler.*"

When the prisoners were brought up to be tried, the counsel for Howell moved the court, that he should be tried separate and apart from Mitchell; but the court refused to grant the motion, and directed both prisoners to be tried together, and they were tried accordingly. They were both allowed peremptory challenges, and both challenged. On the trial, the following facts appeared in evidence. On the 28th February, 1809, John Guest, a cabinet-maker, in the city of New-York, received a letter from one Abraham Cooper, dated at Brunswick, (New-Jersey,) and containing the check in question, purporting to be drawn by Benjamin Butler, on the Merchants' bank, for which check Guest was directed to obtain the money, and, after retaining 35 dollars, the price of a bureau, which was directed to be forwarded, to remit the balance to Cooper, in a letter directed to the care of one De Graw, an inn-keeper at Brunswick. On the next day, Guest presented the check at the Merchants' bank, received the money, and, after deducting the 35 dollars as requested, transmitted the residue according to the directions of Cooper. The amount of the check was charged by the bank, who did not then suspect a forgery, to *Butler, the drawer, who kept a cash account with the bank.

On the 3d March, De Graw received a letter from Cooper, dated in New-York, requesting that the letter received by him (and which contained the money sent by Guest) might be forwarded to New-York, addressed to Silas Fordham, with which request De Graw immediately complied. During these transactions, Butler came to some explanation of his account with the bank, and declared the check in question to be a forgery. In consequence of this declaration, the bank immediately took measures to ascertain the fact of forgery, and to recover back

forgery, B. was held to be a competent witness, to prove the forgery, he having received a release from the bank; and that he was not answerable to C. for the money, even if the check were genuine, the bank having acted without his direction.

In an action by C. against B. the consideration for which the check was given might be inquired into; if it was given for a pre-existent debt, and the check proved bad, B. would be still liable for the original debt. A promise without a consideration, even though it be in writing, is a *nudum pactum*.

Whether, in every criminal case, a witness who is not interested in the event of the cause, is not a competent witness? *Quære.*

A person indicted for forging an "order for the payment of money," is not entitled to a peremptory challenge, it being an offence under the statute, punishable only with imprisonment for a term of years. In all cases where a right of peremptory challenge does not exist, two or more persons maybe indicted, and tried jointly or separately, in the discretion of the court. (a) Whether two persons indicted for a capital offence, and entitled to a peremptory challenge, can be tried together against their consent? *Quære.*

A check in the name of B., on the bank, was passed by C. to D., who

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received the money and remitted it to C as his agent. The check was afterwards discovered to be a forgery, and the bank got possession of the money before it reached the hands of C. On an indictment for the

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the money which had been paid on the check ; and they succeeded in tracing the transaction, so as to seize, at the post-office, on the 4th March, the letter forwarded by *De Graw* to *Fordham*, and which contained the money. On the 7th March, the bank credited *Butler* the whole amount of the check, who received the same. The bank intended, at all events, to have credited *Butler* the amount of the check, as soon as they were fully satisfied that it was a forgery. (a)

At the trial, *Butler*, whose name had thus been forged, was offered as a witness, on the part of the people. in order to prove the forgery. He was objected to by the counsel for the prisoner ; but on producing a release from the bank, he was admitted. At the request of the prisoner's counsel, the point as to his admissibility was reserved for the decision of this court. The prisoner was convicted, and *Mitchell* acquitted.

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Griffin, for the prisoner. 1. The prisoner, against his consent was tried together with *Mitchell*. He ought, according to his request, to have been tried alone. It is a principle of justice, which our law is anxious to maintain, that every man who is accused, should have a fair and impartial trial; and the court cannot throw any impediment in the way of such a trial, to the prejudice of the accused. Now, if a prisoner is compelled to be tried with others, he may be greatly prejudiced by the circumstance. An innocent person, put upon his defence jointly with a great and notorious offender, may be materially injured from being placed in such a situation. Again, a prisoner indicted for a capital offence, is allowed to challenge peremptorily twenty of the jurors. The benefit of this privilege may be destroyed by his being tried with another, who may exercise the same right ; for his associate may, perhaps, challenge the very men he would wish to be his triors. (See *King v. Philips and others*. 2 Str. 920.)

2. *Butler* ought not to have been admitted as a witness. An interest in the question put to a witness may produce as strong a bias on his mind, as an interest in the event of the suit. It is a settled rule, that a person whose name is forged is not a competent witness to prove the forgery. (*Peak L. of Ev.* 105. 107. 177.) *Butler*, it is true, had a release from the bank ; but if there is any other person to whom he would be liable, if the check were genuine, his interest still remains. Now he was liable to *Cooper* ; for if the check proved bad, *Cooper* might consider it as no payment, and resort to his original demand. Again, he might bring an action on the check against *Butler*, and if the latter should allege that the check had been paid by the bank, *Cooper* might answer, that the money had been stopped *in transitu*, by the bank, so that there had not

Guest and *De Graw* were innocent agents in this transaction, being the dupes of the artful contrivance of *Howell*. *Fordham* was a fictitious personage.

been a real and effectual payment. The case of the *King v. Usher*, (1 *Leach*, 57.) may, perhaps, be cited; but that was very different from the present. The banker had not charged the person whose name was forged with the money, being satisfied of the forgery; and the question was only between the banking house and the man who was injured. Here is a third person who has received the check.

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Riker (district attorney) and *Sampson*, contra.

1. From the observations made by Mr. Justice *Buller*, in the case of *Young and others v. The King*, in error, (3 *Term Rep.* 106.) there *can be no doubt of the practice in *England* to try two or more prisoners together; and *Buller* mentioned a case before him, where two persons were tried together for murder, where the evidence affected the prisoners differently, and that he summed up the cases separately to the jury, and took separate verdicts against each. *Foster* (*Rep.* 360. *Disc.* 3. c. 2.) mentions the same practice. The prisoner, in the present case, was not entitled to a peremptory challenge; for the act of the 18th *April*, 1808, (31 *sess.* c. 155.) has altered the law of the 21st *March*, 1801, (24 *sess.* c. 54.) so that the forging of an order for the payment of money, is now punishable with imprisonment for a term of years only, and not for life. (a) The objection, therefore, in regard to the right of peremptory challenge, must fail.

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2. *Butler*, after his release, was a competent witness. In the case of *Dr. Dodd*, Lord *Chesterfield*, whose name was alleged to be forged, was admitted as a witness, on producing a release from the supposed obligee of the bond. (1 *Leach*, 185.) A person whose name is forged may be a witness to prove the forgery, where he is not directly interested in the question. (*Buller*, *N. P.* 289.) After the check had been regularly paid at the bank, it was at an end, and *Butler* could never afterwards be made liable to *Cooper* on the check. The money was paid to *Guest*, the agent of *Cooper*, which was equivalent to a payment to *Cooper* himself. The case of the *King v. Usher* is a strong case to show, that *Butler*, after his release, was a competent witness.

T. A. Emmet, in reply, observed, that though, in *England*, prisoners may be compulsorily tried together, yet there were substantial reasons for a different practice in this state. In *England*, the sheriff is unlimited as to the number of jurors to be returned on the panel. By the act of the 31st *March*, 1801, (24 *sess.* c. 98. s. 9.) the sheriff is authorized to summon no more than 36 jurors. (b) Should any deficiency of jurors exist, a *tales* must be awarded. If a man, against his consent, is put upon a trial with another, who peremptorily challenges, it is a most

(a) 2 *Rev. Stat.* 673.

(b) 2 *Rev. Stat.* 413.

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serious injury, for the very best and *most unexceptionable jurors for him, may thus be set aside. There may be challenges, *for cause*, as to one prisoner, which would not exist as to the other. The law is studious in the protection of the accused, and through the whole course of the trial he is benignly reminded of his privileges, that he may be on his guard. Again, *Howell* must have been led into a mistake, by the allowing a peremptory challenge to his associate, and the whole panel was thus deranged, so that the prisoner could not have a fair opportunity to exercise his right.

2. The check was not in fact paid, for though the money was paid at one moment, it was taken back at the next, and *Butler* could not, therefore, in an action against him by *Cooper*, allege that it was paid. His only defence would be, that it was a forgery. If the check was genuine, and the bank acted by the direction of *Butler*, then *Butler* would be equally liable to *Cooper*, for the money thus wrongfully taken. In any view of the case, therefore, *Butler* was interested in proving the check to be a forgery.

A question was raised, on the argument, whether, in case the court should be of opinion, that either of the objections was well founded, they would grant a new trial or discharge the prisoner. *Riker* insisted, that the court had the power to grant a new trial, and cited 2 *Str.* 968. 6 *Co.* 14. *Arundel's* case. 4 *Hawk. P. C.* 330. c. 36. s. 15. *People v. Townsend*, 1 *Johns. Cases*, 104. and the case of the *United States v. Fries*, (3 *Dallas*, 515.) which he said was a strong case to this point.

Emmet observed that, in *Arundel's* case, there was a fault in the *venire*; that he never heard of a new trial in a criminal case, and where it was not asked for. The prisoner, in the present case, does not wish for a new trial, nor does the public prosecutor apply for it. Where a person has once gone through a trial, and been put in jeopardy of his life, the court will never grant a new trial, unless *in favorem vite*, at the instance of the party. (*People v. Barret and Ward*, 2 *Caines*, 304. 1 *Johns. Rep.* 66.)

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*KENT, Ch. J., delivered the opinion of the court. The defendant was convicted at the last court of general sessions of the peace in this city, for forging the check of *Benjamin Butler*, purporting to have been drawn upon the *Merchants' bank*. The record has been removed into this court, and the counsel for the prisoner have raised two objections to the legality of the conviction.

1. That the prisoner was tried, against his consent, jointly with one *Mitchell*; 2. That *Butler*, who was admitted as a witness against him upon the trial, was incompetent, on the ground of interest.

1. It appears by the indictment, that the prisoner was indicted for forging an order for the payment of money. The check is set forth, *in hæc verba*, in the indictment, but it is denominated an order. The statute of 1808 made some alterations of the former law in respect to the punishment of forgery. The forging of deeds, promissory notes and bills of exchange is punishable with imprisonment for life, as before; but the forging of orders for the payment of money, is now only to be punished with imprisonment for a term of years. A check is not, either in common parlance, or in the technical language of the books, called a bill of exchange or promissory note, though it may, in some respects, have the same legal operation. The statute, in discriminating between bills and notes, and orders for the payment of money, must be interpreted according to the usual and settled understanding of those terms, and a check will, therefore, fall within the description of an order for the payment of money. It has been so understood by the public prosecutor in this case, and if the question was otherwise doubtful, the classification given to the paper in the indictment ought to prevail over the other denomination of the instrument, as that would inevitably enhance the punishment. Penal statutes ought to be read according to the ordinary import of language; and if a term would equally admit of two constructions, the one attended with the milder consequences ought to be adopted. In this case, then, the prisoner *was not entitled to his peremptory challenge; and consequently the force of the objection to his being tried jointly with *Mitchell*, is destroyed. In all cases, at least where the right of peremptory challenge does not exist, and two persons are indicted jointly, they may be tried jointly or separately, at the discretion of the court. This is the settled practice, both here and in *England*, and no objection to it exists sufficient to outweigh the public convenience of the rule.

2. The next objection is to the competency of *Butler* as a witness. The claim which the bank might have had against him was released, and the interest, if any, which *Butler* had in supporting the charge of forgery, is supposed to arise from his being liable to *Cooper*, the nominal payee of the check. The ancient rule in *England*, that a witness, whose name was forged, was incompetent to prove the forgery on an indictment, because he was interested in the question, still prevails in their courts, and it was adopted by this court in the year 1794. The grounds or reasons of that decision are not before the public, and we therefore do not know them. It is probable that the court assumed the *English* rule as they found it then existing. But

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since that time, the question of interest in a witness has been investigated and defined with more precision, both in *England* and in this state. The rule now, in all such cases, and I believe I may say in almost all criminal cases, except in the case of a forged instrument, is, that the witness is to be received, if he be not interested in the event of the suit, so that the verdict could be given in evidence in an action in which he was a party. The interest which the witness may have in the question put, is no longer the test. That degree of interest goes only to the credit of the witness. The exclusion of the witness, in the case of forgery, has therefore now become an anomaly in the law of evidence, for it is certain that the conviction of the party charged with forging a check, cannot be given in evidence in a subsequent civil suit on the check; and as the reason of the old rule has *ceased, by a sounder definition of the question of interest, and as it is not now applied to other criminal cases, it would seem to be fit and proper, that the rule itself should no longer be applied to the case of forgery. But the present case does not turn upon the validity of that rule, and therefore the court do not now interfere with it. Assuming the rule to exist according to the decision in the case of *Hamilton*, in 1794, we are of opinion, that the interest of *Butler* was extinguished by the release from the bank. He was no longer answerable to *Cooper* upon the check, for that had been paid and satisfied by the bank. *Cooper*, by means of his agent, had received from the bank the amount of the check, and had applied part of it to his private use, and transmitted the residue to this city, by means of the mail. The check was as much spent, as if it had slept for years afterwards on the files of the bank. It had completely performed its object. The subsequent recovery of a part of the money by the bank did not revive and give efficacy to the check. *Cooper* had his remedy against the bank, if they had unduly taken money out of his possession, but it gave him no remedy against *Butler*, any more than if any third person had received that money wrongfully from the possession of *Cooper*. If the bank had acted as the agent of *Butler* in receiving the money, he would then, perhaps, have been equally liable (supposing the check to have been genuine) as a tortfeasor; but there is no evidence in the case, that the bank acted under his directions. They acted voluntarily, and with the laudable design of detecting a fraud, and avoiding a loss. They were struggling to indemnify themselves, and not for the service of *Butler*. But the objection appears to be susceptible of another and conclusive answer. If *Cooper* was to sue *Butler*, the consideration for which the check was given would be a lawful object of in-

quiry. The consideration of any negotiable paper is examinable, as between the original parties to that paper; and from the facts in this case, we must consider *Cooper* as the person who originally received the check from *Butler*, *supposing it to be good. The check, then, was founded upon a previous good consideration, or it was not. If there was a pre-existent debt for which it was given in payment, the debt would still exist against *Butler*, if the check was not good. Unless a check be paid, it is no payment. If, on the other hand, the check was voluntary, and given without consideration, *Butler* was not bound to pay it, for a promise without a consideration is a *nude pact*, even though it be in writing. In no light, then, in which the court have been able to view the question, does it appear, that *Butler* was incompetent, and, consequently, neither of the objections to the conviction of the prisoner appear to be well taken.

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Judgment, that the prisoner be sent to the state prison, to be kept at hard labor, for fourteen years.

TEEL against FONDA.

THIS was an action of debt, on the 8th section of the act (24th sess. c. 87.) (a) to prevent and punish champerty and maintenance, in which there is the following *proviso*: "That it shall be lawful for any person, being in lawful possession, by taking the yearly rents or profits of any lands, tenements, or hereditaments, to buy or obtain, by any reasonable ways or means, the pretended right or title of any other person thereto." The declaration in this case did not negative the *proviso*; and a verdict having been found for the plaintiff, a motion was made in arrest of judgment.

Cady, for the defendant. The 8th section of our act corresponds with the second clause of the *British* statute, (32 *Hen.*

In an action on the 8th section of the act to prevent champerty and maintenance, the plaintiff, in his declaration, need not negative the *proviso*. Where a clause or section of a statute giving an action for any offence, contains a *proviso* or exception, which is against the plaintiff, or is matter of defence or justification, the plaintiff need not negative the *proviso* in his declaration. (b)

caution for the defendant, the plaintiff need not negative the *proviso* in his

(a) 2 Rev. Stat. 691.

(b) *Burr v. Van Burskirk*, 3 *Con. Rep.* 370.

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VIII. c. 9.) *the fourth clause of which contains the proviso to be found in the eighth section of our act. (1 *Johns. Rep.* 345.) The declaration does not negative the *proviso* in the eighth section. The plaintiff should have averred, that he was not in possession at the time of the purchase. In *Blasdale v. Hewitt*, (3 *Caines*, 137.) it was decided, that in an action for the penalty given by the 7th section of the act regulating inns and taverns, the plaintiff ought to have negatived the proviso. (1 *Saund.* 262. note. 1 *Lord Raym.* 120. 1 *Term Rep.* 141.)

Gold, contra. The declaration in this case is according to the *English* precedents which are to be found in the books of entries, (*Rastall's Ent.* 430. *Aston*, 71. 7 *Went.* 134.) in actions on the statute of 32 *Hen.* VIII. c. 9. It makes no difference whether the *proviso* is in the same clause or not, if it refers to the former enacting clause for the offence. There is a distinction in the books between a proviso and an exception. In *Whitwick v. Osbaston*, (1 *Lev.* 26. 1 *Com. Dig.* Act. on Stat. A. 3.) which was an action of debt for a penalty on the act of general pardon, it was moved in arrest of judgment, that divers persons are excepted in the act, and that the plaintiff had not shown that he was not one of the excepted persons; but it was held, that the body of the act being general, and the persons excepted by a *proviso*, the plaintiff was not bound to show that he was not within the proviso; though it would be otherwise, if the act had been that all persons, except such, &c. The party who claims the benefit of a proviso or condition, ought to show it, if he wishes to take advantage of it. The case of *Bennet v. Hurd* (3 *Johns. Rep.* 438.) is an answer to that of *Blasdale v. Hewitt*, and is conclusive as to the principle for which the plaintiff contends.

But this objection, whatever may be its effect on a demurrer, cannot prevail on a motion in arrest, after a verdict; for the plaintiff must have proved an adverse possession, in order to entitle himself to a verdict of the jury. (1 *Saund.* 228. note. 1 *Sellon's Pr.* 499. 4 *Burr.* 2018. 1 *Salk.* 365. note.)

Cady, in reply, observed, that the difference between our act and the *British* statute, was a sufficient answer to the **English* precedents; and that in the case of *Jones v. Axen*, (1 *Ld. Raym.* 120.) it was held, that where the *proviso* was in a distinct clause, it ought to be shown by the plaintiff.

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VAN NESS, J., delivered the opinion of the court. The imperfect manner in which the case of *Blasdale v. Hewitt* (3 *Caines*, 137.) is reported, must have given rise to the present motion. There some of the court are represented as saying, that because the declaration did not negative the qualifications of the *proviso*, it was therefore bad. The reporter must have misapprehended the ground of that decision. *Bennet v. Hurd*
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(3 *Johns. Rep.* 438.) contains a correct exposition of the law on this subject. The rule is this: If the *proviso* furnishes matter of excuse for the defendant, it need not be negatived in the declaration, but he must plead it. Such is the *proviso* in the present case. It forms no part of the plaintiff's title, and affords merely an excuse to the defendant, if he had come within its purview. It would be unnecessary to proceed further, were it not that these cases are apparently irreconcilable, and it is desirable that the law should be finally and correctly settled. Serjeant *Williams*, in his note to 1 *Saund.* 262. says, "But when the exemption is contained under the proviso to a subsequent section or act of parliament, it is matter of defence, and, therefore, it is not necessary to state in the declaration, that the defendant is not within such proviso." The only inaccuracy in this remark consists in restricting the rule to provisos contained in a subsequent section or statute, which was not warranted by the cases. In *Jones v. Azen*, (1 Lord *Raym.* 119.) *Treby*, Ch. J., with the concurrence of the rest of the court, says, "that where an exception is incorporated in the body of the clause, he who pleads the clause ought to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause, and leave it to the adversary to show the proviso." The same distinction is *adopted in the case of the *King v. Bryan*, (2 *Str.* 1101.) that when the offence is brought within the enacting clause, and the justification comes in by way of *proviso* or exception, in the first case, it is matter of defence to be shown by the defendant; in the other case, the exception must be negatived. In *Spieres v. Parker*, (1 *Term Rep.* 141.) all the judges agree that the rule is, that any one who will bring an action for a penalty on an act of parliament, must show himself entitled under the enacting clause; and if there be a subsequent exemption, that is a matter of defence, and the other party must show it to protect himself against the penalty.

The court are of opinion, therefore, that the motion must be denied.

Motion denied.

NEW-YORK,
May, 1809.

TEEL
v.
FONDA.

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NEW-YORK,
May, 1809.

WATKINSON
v.
LAUGHTON.

WATKINSON *against* LAUGHTON.

What is a sufficient affidavit of a cause of action on a motion to discharge a defendant on common bail.

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THIS was an action brought to recover damages for the non-delivery of certain goods shipped at *Liverpool*, on board of a vessel, of which the defendant was master, and consigned to the plaintiff on his own account. The defendant having been held to bail, *Griffin*, in his behalf, now moved for his discharge, on filing common bail. It appeared that a similar application had been made to the recorder of *New-York*, in the last vacation, who had refused to discharge the defendant. On showing cause before the recorder, the plaintiff's affidavit stated, that he could not certainly know that the goods in question were actually shipped, yet he had no doubt that they were shipped, as he received a regular invoice of them, and a bill of lading signed by the defendant; that the goods were contained in trunks, one of which, on being opened, was found entirely *empty, and several others partly empty, and from the appearance of the mats and ropes, the trunks had evidently been opened since the goods had been packed up; that the goods missing were demanded of the defendant, and the freight tendered, but they were never delivered; and that the defendant's place of abode is at *Liverpool*.

Griffin insisted, that the affidavit of the plaintiff was defective, as it did not state with certainty, that the goods alleged to be lost were actually shipped, nor that they were embezzled by the defendant, or lost by his negligence, but merely a belief that they were so. That the contents of the trunks were unknown to the defendant, and the bill of lading expressly mentioned, "contents unknown." He cited 1 *Sellon's Practice*. 112. and *Welsh v. Hill*, (2 *Johns. Rep.* 100.)

Wells, contra, offered a supplementary affidavit.

T. A. Emmet, for defendant, objected, that as this was an appeal from the decision of the recorder, any new affidavits would be irregular.

SPENCER, J. This is a new application to this court, founded on a notice, in the usual way; it is, therefore, proper to receive new affidavits.

Per Curiam. We consider the affidavit of the plaintiff which was read as sufficient, and the motion must, therefore be denied.

Rule refused.

NEW-YORK,
May, 1809.

 BURK
 v.
 BARNARD.
*BURK *against* BARNARD.

LYNCH, for the plaintiff, moved to amend the *capias ad respondendum* in this cause, which was sued out on the 15th April last, and returnable at this term, and the defendant arrested thereon. The writ was tested by mistake in the year 1808, instead of the year 1809. He cited *Carty v. Ashly*, (2 *Black. Rep.* 918.) as a case in point.

A void writ
cannot be a-
mended.

H. Bleeker, contra, contended, that the writ was a nullity, and that where process is void, it cannot be amended, and relied on the case of *Bunn v. Thomas & King*. (2 *Johns. Rep.* 190.)

Per Curiam. It was decided in the case of *Bunn v. Thomas & King*, that where a term or more intervenes between the teste, and return of a writ, it is a nullity, and that where a writ is void, it cannot be amended. The motion must be denied.

Rule refused.

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NEW-YORK.
May, 1809.

RATHBONE
v.
WARREN.

HAVILAND against BOND.

In *dower*, it is a matter of course, after the demandant has counted, to grant the defendant a special *imparlance* until the next term.

IN *dower*. *D. B. Ogden*, for the demandant, moved, that the tenant should be called. *Slosson* appeared for the tenant; *Ogden*, thereupon, counted; *Slosson* then moved for a special *imparlance* until the next term, to which *Ogden* objected: But the court said, that it was a matter of course to grant a special *imparlance* until the next term. (*Booth*, 36.)

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*RATHBONE and another against WARREN, Bail, &c.

Where the *capias ad respondendum* against bail, was made returnable on the third day of the term, and on the 12th day of the term, the bail made affidavit, that until the 6th day of the term, he had supposed the writ returnable on the last day of the term, so that he should have 8 days in the next term to surrender, and that after discovering his mistake, it was impossible to make the surrender in the 8 days in term, as the principal was out of the state, at the distance of more than 150 miles from Albany, it was held that the application for relief was too late, and that the excuse was not sufficient.

THIS was an action of debt brought against the defendant as bail of one *Warren*. A *capias ad respondendum* was issued against the defendant, who resided at Albany, returnable the third day of the term, being 3d May, on which he was arrested on the 2d May. The defendant, in his affidavit, stated, that until the 6th May, he supposed that the writ was returnable on the last day of this term, and that he should have until the next term to surrender the principal. That the principal was absent, and out of the state, at the distance of more than 150 miles from Albany, so that it was not possible to make a surrender within the time required, or during the present term.

C. Bogert, for the defendant, now moved for a rule, allowing the defendant until the first day of the next term, to surrender the principal, and that on making such surrender, all proceedings against the bail should be stayed. *Van Rensselaer v. Hopkins*, (3 Caines, 136.) *Boardman v. Fowler*, (1 Johns Cases, 413.)

H. Bleecker, contra, read an affidavit, stating, that the *ca. sa.* against the principal was returned *non est ino.* at the last term. He contended, that as the 8 days had expired since the return of the *capias ad respondendum* against the bail, they were absolutely fixed.

Per Curiam. In the case of *Boardman v. Fowler*, the bail was prevented by sickness from making the surrender in time.

The excuse offered by the defendant is not sufficient. The motion must be denied.

Rule refused. (a)

NEW-YORK,
May, 1809.

HOWLAND
v.
LENOX and
MAITLAND

(a) Though, in *Pennsylvania*, an *exoneretur* will not be entered on the bail-piece, on the ground that the defendant is a lunatic, and as such confined in the hospital, even in case the derangement is shown to be a permanent malady, (*Bowerbank v. Payne*, 2 Wash! C. C. Rep. 464.) yet the sickness of the principal has been held, in *New-York*, to be a ground for enlarging the time for the bail to surrender. *Thomas v. Bulkley*, 5 Cow. Rep. 25. Imprisonment of the principal within the state may be, also, a ground for enlarging the time for surrender, where the bail are pressed with a suit; (*Phoenix Ins. Co. v. Mowall*, 6 Cow. Rep. 599.) and where the principal is sentenced to imprisonment in the state prison of another state, for a term of years, (*Loflin v. Fowler*, 18 Johns. 335.) the bail will be entitled to an *exoneretur*. So time will be given where the bail is in confinement as a debtor in another state. *The People v. New-York C. P.* 2 Wend. Rep. 263. The practice in the *English* courts is stated to be, as the short result of all the determinations, that, wherever the court cannot absolutely exonerate the bail, and, either from the constitution of the court itself, or the circumstances of the particular case, cannot enable them at once to make a formal render, they will, in all practicable cases of a temporary impossibility occasioned by act of law, and even perhaps in other cases, under special circumstances, enlarge the time for making the render, in order to give the bail an opportunity of rendering their principal, as soon as it shall be in their power to do so. 13 *Price's Rep.* 532, 3, in *notis.* 1 *Tidd's Pract.* 293. (9th ed. 1828.)

HOWLAND and others against LENOX and MAITLAND. [311]

ON a question, as to the retaxation of the costs in this cause, the court said, that where witnesses are brought from another state, the time of their attendance can only be computed from the place of trial, coming and returning, to the boundary line of the state; and that the distance must be taken accordingly.

Costs of attendance of witnesses from another state, how taxed

NEW-YORK,
May, 1809.

JACKSON.
v.
DENNISTON.

JACKSON, *ex dem.* M. DENNISTON and others, *against*
MARY DENNISTON.

A devise to a witness to a will is absolutely void.

If a defendant in ejectment claims title as tenant in common, he ought to enter into the common rule specially, otherwise, if he enters into the usual consent rule, he cannot object that no actual ouster was proved at the trial.

THIS was an action of ejectment. The cause was tried at the *Orange circuit*, before Mr. Justice *Thompson*, the 5th September, 1808, when a verdict was taken for the plaintiff, by consent, subject to the opinion of the court, on a case containing the following facts :

George Denniston died seised of the premises in question, on or about the 10th January, 1804, having previously made his will, dated the 21st December, 1803. There were three subscribing witnesses to the will, one of whom, *George Denniston*, was a son, and a devisee of the testator. The defendant is the widow of *George Denniston*, the witness, and in possession of the premises devised by the will to *James Denniston*, who was also a witness to the will. *James Denniston* and *James M. Wilkins*, by their deed, dated the 2d September, 1808, conveyed the premises to the defendant. The lessors of the plaintiff are heirs at law of *George Denniston*, the testator, and claim two sixths of the premises. *James Denniston*, at the time *he subscribed the will as a witness, was an infant, and is now about 20 years of age. There was no proof of any actual ouster by the defendant, except her declaration, made before the commencement of the present suit, that the lessors were not entitled to any part of the premises.

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Fisk, for the plaintiff, insisted, that the devise to *James Denniston*, the witness to the will, was void ; and that the premises having descended to the lessors, as the heirs at law of *George Denniston*, the plaintiff was entitled to recover. He relied on the 12th section of the statute concerning wills, by which a devise or bequest to a witness to a will, is declared to be void, as regards such witness.

J. Radcliff observed, that he did not deny the general rule as founded on the statute, but the question was, whether a witness to a will could not, by a conveyance to a third person, so divest himself of his interest, as to be a competent witness at the time of his examination, though not so before. (*Jackson, ex dem. Cooder, v. Woods, 1 Johns. Cases, 163.*) If the devise was void, *ab initio*, then, indeed, there must be an end to the question.

He contended, also, that the lessors of the plaintiff, if entitled to recover, must be considered as tenants in common, and that without proving an actual ouster, they could not maintain this action.

Per Curiam. The statute is peremptory. It makes the devise to the witness void, and, of course, no title can exist under it. As the defendant claims under a sale by the witness, as devisee, her title must be void.

The lessors claim an undivided part only, and if they show title to any part, they will recover *pro tanto*. If the defendant meant to set up a title as tenant in common, she ought to have entered into the common rule *specially*. As she has not done so, it was not necessary for the plaintiff to prove an actual ouster. (a)

Judgment for the plaintiff.

(a) See 2 Sellen's Pr. 112. 3 Burr. 1895.

NEW-YORK,
May, 1809.

WOOD
v.
HYATT.

*WOOD against HYATT.

[* 313]

THIS was an action of trespass *quare clausum fregit*, for breaking the plaintiff's close, called the south-east meadow, in lot No. 80, in the township of *Junius*, on the 20th day of *July*, 1805. The defendant pleaded the general issue, and *liberum tenementum*.

The cause was tried before Mr. Justice *Spencer*, at the *Seneca* circuit, in *June*, 1808.

The principal facts in this case were the same as in that of *Hyatt v. Wood*, (*ante*, 150.) The following are all the facts which it is thought necessary to state in addition: *Hugh Jackson*, as witness for the plaintiff, testified, that *Jackson* and *Bunnell* occupied that part of the *Green* farm which is south of the road, except the pasture and the south-east meadow; that the plaintiff occupied the pasture; that the plaintiff had mowed some grass himself in the south-east meadow, and that the witness mowed under the plaintiff, in the same meadow, for a day or more, when the defendant came to the meadow, and threatened to turn the witness out, if he continued to mow, when the witness left the meadow, and the defendant mowed the grass. The plaintiff had other persons at work for him, in other parts of the farm, in *June*, 1805.

Reuben S. Morris, a witness for the defendant, testified, that on the 27th *February*, 1805, he saw the defendant in possession of lot No. 80. in *Junius*; that *Green* was present, and

Where *A.*, having been in possession of land, about 10 years, afterwards, on the 7th *November*, sold all his right, interest, and improvements to *B.* and promised to deliver the possession to him on the first day of *March* following, and acknowledged that he held the possession under *B.*, it was held, that *A.* was the tenant of *B.*, and having continued in possession after the 1st *March*, he became a tenant at sufferance, and that by the entry of *B.* an end was put to the tenancy, so that *B.* might maintain trespass against one claiming to hold under *A.*

Such a title in *B.* is sufficient against all but the rightful owner; and in an action of him, he may plead *liberum tenementum*. See *ante*, p. 150.

NEW-YORK
May, 1809.

WOOD
v.
HYATT.

gave his consent to the defendant, that he should enter into possession; that *Green* was then in possession; that the possession was given to the defendant in behalf of *Murray* and *Mumford*, and in consequence of an agreement between them *Green*, and the defendant.

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The judge charged the jury, that in order to maintain the action, it was not sufficient for the plaintiff to show a *right to the possession merely, but he must prove that he had the actual possession at the time of the trespass complained of, and that in his opinion, the weight of evidence was, that the defendant was in the actual possession of the south-east meadow, and that the defendant was not, therefore, liable to the action.

A motion was now made to set aside the verdict and for a new trial.

Riker, for the plaintiff, contended, that according to the decision of the court in *Hyatt v. Wood* (*ante*, 150.) *Wood* must be considered as having a title, and that *Green* being a mere tenant at sufferance under *Wood*, the possession was changed, by the entry of *Wood* on the 19th July, 1805, and he must, therefore, be considered as in the actual possession, so as to enable him to maintain trespass.

Hopkins, contra, admitted, that the entry of the landlord would put an end to the tenancy at sufferance, and change the possession; but he denied that the plaintiff had shown any title sufficient to make him a landlord. He said that it was a mere struggle between the parties for the possession.

SPENCER, J. According to the decision of the court, at the last term, *Green* is to be considered as a tenant at sufferance, and as the defendant came into possession under *Green*, he must stand in the place of *Green*.

VAN NESS, J. The court, in the case of *Hyatt v. Wood*, did consider, that *Wood* had a sufficient title to support the plea of *liberum tenementum*, and that *Green* was a tenant at sufferance. That decision, therefore, must be conclusive in the present case.

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Per Curiam. *Green* became a tenant at sufferance to the plaintiff, after the first day of *March*, and the defendant, who held under *Green*, must be considered as standing in his *place, and as also a tenant at sufferance. The entry of the plaintiff on the *locus in quo*, before the trespass alleged, put an end to this tenancy, and made the defendant a trespasser. There must be a new trial, with costs to abide the event of the suit.

New trial granted.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK

IN AUGUST TERM, IN THE THIRTY-FOURTH YEAR OF OUR
INDEPENDENCE.

In the case of JOHN V. N. YATES.

ON the second day of the last *February* term, *Emmet* moved for a *habeas corpus*, to bring up the body of *John V. N. Yates*, a prisoner in the custody of the sheriff* of *Albany*. The motion was grounded on sundry affidavits which were read.

The court said, that as it was a matter of importance, they would take until the next day, at the opening of the court, to consider whether it was proper to grant the motion.

Emmet then prayed that the prisoner might be admitted to bail in the mean time.

A discharge of a prisoner, committed by a judge of this court in vacation, on another *habeas corpus*, and the sheriff also returned the attachment and proceedings prior to the last order of commitment; it was held, that the sheriff could not return the true cause of caption, without also stating the original attachment and subsequent orders, and that the whole return might be received, and examined into by the court.

A discharge of a prisoner, committed by an order of the Court of Chancery, by a judge of this court, in vacation, on *habeas corpus*, is not conclusive, either upon the Court of Chancery, or this court; and the prisoner may, after such discharge, be again committed for the same cause.

Where *A. B.*, who was a master in chancery, was committed by the chancellor, and the order of commitment stated that *A. B.*, while he was master, filed a bill, to which he subscribed the name of *C. D.*, one of the solicitors of the court, without his knowledge or consent, and prosecuted the cause in his name, "contrary to the statute in such case made and provided, in wilful violation of his duty as master, and in contempt of the authority of the court," and "for the said malpractice and contempt," the said *A. B.* was ordered to be "committed to gaol, there to remain until the further order of the court." It was held that this was a legal and valid commitment for a contempt, even if the party might have been indicted for an offence against the statute concerning counsellors, solicitors and attorneys. But whether it is an indictable offence within that statute, *quære*.

This court has no power to discharge a person committed by the Court of Chancery for a contempt; and it will presume that the proceedings of that court were legal, and that the conviction for the contempt was on sufficient and legal evidence.

A commitment, "until the further order of the court," is good.

Where a sheriff returned to a writ of *habeas corpus*, that he held the prisoner by virtue of an order of the Court of Chancery, which order referred to a former attachment, setting forth the grounds of commitment, [* 318]

corpus, that he held the prisoner by virtue of an order of the Court of Chancery, which order referred to a former attachment, setting forth the grounds of commitment, [* 318]

ALBANY,
August, 1809.
Case of
J. V. N. YATES.

KENT, Ch. J. Until the party is actually before us, on a *habeas corpus*, we cannot admit to bail, and we do not think proper to allow the writ, without some consultation on the case.

The writ of *habeas corpus* having been allowed, on the following day, the prisoner was afterwards, (*Thursday*, the 9th *February*.) brought up, and the following return was made by the sheriff: That the prisoner was, on the 7th day of *February*, arrested by him, and in his custody, by virtue of an order of the Court of Chancery, made the 5th day of *December*, 1808, which states, that the Court of Chancery did, on the 20th day of *September* last, make another order, as follows, to wit "Upon reading the order made in this matter on the 5th day of *September*, and the certificate of the sheriff, stating, 'that on the 12th *September*, he had arrested the defendant, and that by virtue of a writ of *habeas corpus*, Judge *Spencer* did, on the same day, discharge him on the ground, that the original cause of the caption was illegal, and that the taking and detaining him, for the same matter, 'was illegal and unwarrantable, and subversive of the liberties of the citizens ;' that as the commitment for the malpractice and contempt, before adjudged by the court to have been committed by the defendant, has *not been remitted by the court, nor the said contempt purged, and the court, deeming the discharge repugnant to the laws of this state, and void, ordered that the sheriff retake the defendant, and recommit him, for his contempt and malpractice, as, in the attachment before issued, was commanded, there to remain, until the further order of the court ;' and the sheriff having returned to the said order of the 20th *September*, that the defendant was not found, it is, therefore, ordered that the sheriff retake the defendant and recommit him for his contempt and malpractice, &c., there to remain until the further order of the court."

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The sheriff further certified, and returned to the *habeas corpus*, that the writ of attachment, referred to in the foregoing order, was dated the 17th *August*, and is as follows : " Whereas, in and by a certain order of the court, on the 13th *June*, in the matter of complaint of *Samuel Bacon* against the defendant, it is set forth, that upon reading the affidavits of *Samuel Bacon*, *Peter W. Yates*, and *Richard S. Treat*, and upon fully considering the subject-matter thereof, it appeared satisfactorily to the court, that the defendant, during the time he was a master of the court, had filed a bill of complaint with *Richard S. Treat*, one of the clerks, in behalf of *Samuel Bacon*, complainant, against *Henry Garretse* and *Charles Morris*, as defendants, and thereto subscribed the name of *Peter W. Yates*, one of the solicitors of this court, without the knowledge or consent of the said *Peter W. Yates*, and had acted as a solicitor in the said cause, in the prosecution thereof, in the name of the said *Peter*

W. Yates, contrary to the statute in that case made and provided, in wilful violation of his duty as master, and in contempt of the authority of this court; it was therefore ordered by the court, among other things, that the defendant be committed, for his said malpractice and contempt, to gaol, there to remain, until the further order *of the court; therefore the court commanded the sheriff to attach the defendant, and convey him to gaol, there to remain until the further order of the court."

ALBANY,
August, 1809.
Case of
J. V. N. YATES.

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And the sheriff further certified, and returned, that the defendant was discharged, on a *habeas corpus*, by Mr. Justice *Spencer*, after being arrested on the said writ of attachment, on the 19th *August*, and the judge certified in his discharge, that, "it having been made satisfactorily to appear to him, that the said commitment was not for any contempt committed by the defendant, towards the said court, but that the same was for an alleged malpractice, on the part of the defendant, as a master in chancery, in using the name of *Peter W. Yates*, as a solicitor, in a certain cause, without his consent, and in violation of the 9th section of the act, concerning counsellors, attorneys and solicitors, (24 Sess. c. 32. *Revised Statutes*, 2d vol. p. 287.) &c., he was of opinion, that the commitment was illegal and unprecedented."

The sheriff further certified, and returned, that the order of the 5th *September* was as follows: to wit, "Upon reading and filing the attachment aforesaid, and the return thereon, stating the discharge aforesaid, and due deliberation having been had thereon, and the court deeming the said discharge repugnant to the laws of the state, legally inoperative and void, it is ordered that the sheriff retake the defendant, and recommit him for his contempt and malpractice, as in the said attachment he was commanded, there to remain until the further order of the court."

The sheriff further certified, and returned, that the defendant was taken on the said order, and again discharged by Mr. Justice *Spencer*, on a *habeas corpus*, on the 12th *September*, who certified in his discharge, as follows, to wit: "It appearing that the defendant has been again taken and imprisoned, for the same matter and cause, whereon he was imprisoned, when discharged on **habeas corpus*, on the 19th *August*, I am of opinion, not only that the original cause of the caption of the defendant was illegal, but that the taking and detaining him on the said order was illegal and unwarrantable, and subversive of the liberties of the citizens;" and he, therefore, discharged him.

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The sheriff also certified, and returned, that after the last discharge, by Mr. Justice *Spencer*, the order first above-mentioned was received by him, by virtue of which order he took the defendant, on the 7th day of *February*, inst., and still detains him in his custody, &c.

ALBANY,
August, 1869.
Case of
J. V. N. YATES.

After the return was read, the *chief justice* observed, that there were many matters stated by the sheriff, which related to proceedings prior to the commitment on which the prisoner was now brought up, by the *habeas corpus*, and it might be a question, whether the papers, as to such previous proceedings, were to be filed, or rejected as surplusage.

Emmet said, that as this was the return of the officer, the only question was, whether the return was sufficient. Leave is sometimes given to amend a return, but he thought no part of it could be struck out, or rejected as surplusage. Besides, as there was a reference in the last order of commitment to the previous proceedings, it was highly proper, if not necessary, to set out the whole proceedings in the return.

After some conversation, it was agreed, that the return should be filed as it stood, and the motion for the discharge of the prisoner be heard on the merits, reserving the question as to striking out, or rejecting, any part of the return, to be decided afterwards. The whole return was accordingly filed, and the counsel for the prisoner moved that he should be discharged.

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**Emmet*. [*Champlin* (a) also argued in support of the motion.] I shall first examine the return as relates to the last order of commitment only. It is bad, on the face of it. It is an *order*, not a *writ* or *warrant*. It is a mere rule of court, directed to an officer who is not bound to obey it. An officer cannot take a person into custody, except by a *writ* issued by the court. In fact, this *order* refers to an original writ of attachment. Where there is an offence, in the face of the court, yet, if the offender goes out of court, before he is taken on an order, he can, afterwards, be taken only by writ. (*Jacob's Law Dictionary, Attachment.*) The highest authority is requisite to deprive a person of his liberty. It must emanate from the court having cognizance of the offence. There can be no execution executed, except by *writ*. In no case will a mere *order* justify the retaking of a person, although the original taking was by writ; but there must be an *alias writ*, or writ of recaption. The first writ was returned, and so was *functus officio*. It could not be revived or renewed by an order; but a new writ was requisite to retake the prisoner.

Another objection is, that a person who had been discharged on a *habeas corpus*, has been taken into custody, a second time, for the same offence, in violation of the *habeas corpus* act. (24 sess. c. 65. First vol. *Laws*, 286. Second volume

(a) It has not been thought requisite to give his argument separately; *Emmet* took a more extensive view of the subject, and, to avoid repetition, I have endeavored to report the whole as one entire argument, and as fully as possible. R. 276

Revised Statutes, page 571.) This raises the question, how far Mr. Justice *Spencer* was authorized to investigate the ground of the commitment. There is some difference in the words used in our act, and in the *English habeas corpus* act. (31 Car. II. c. 2.) The language of the former is, "If any person be imprisoned as aforesaid, in vacation time, it shall be lawful," &c. In the latter, the words are, "If any person shall be or stand committed or detained for any crime." A bill having been brought into the *English* *parliament, the opinion of the twelve judges was taken, whether a judge, in vacation, could issue a *habeas corpus*, and they were of opinion that he could not, unless the party was committed for a crime. Our act, in reference, no doubt, to that decision, generalizes the law, omitting the words, "for any crime." What, then, is the operation of the *habeas corpus* act, on the power of a judge, in vacation? Most clearly, that of giving, except for the purpose of bailing a traitor or felon, to a single judge, in vacation, a power co-extensive with that of this court, in term time. If, then, this court has the power now to inquire into the grounds of the commitment, it follows, that a judge, in vacation, has the same power. The exception is, "Other than persons convict or in execution by legal process, or committed for treason or felony, plainly and specially expressed in the warrant of commitment." Who is to decide on the legality of the process? The judge. To prove that the discharge was improper, it must be shown, that Mr. *Yates* was confined by legal process. Then what was the process? If the last order of commitment, it is defective in not showing that the first process was legal; but it does not even set forth that process.

Then, will a discharge by this court, under a *habeas corpus*, prevent a person's being taken, and imprisoned a second time, for the same offence? The 5th section of the act declares, "That no person who shall be set at large upon any *habeas corpus*, shall be again imprisoned for the same offence, unless by the legal order or process of the court wherein he is bound by recognizance to appear, or other court having jurisdiction of the cause." These words are explained by the 3d section, which directs the judge "to discharge the prisoner, on taking his recognizance, &c. for his appearance at the next court where the offence is properly cognizable."—"Unless it shall appear to the judge, that such prisoner is detained *upon a legal process out of some court having jurisdiction of criminal matters, or by some warrant under the hand and seal of a judge, or justice, for some matter or offence for which, by law, the prisoner is not bailable."

The only mode in which a person, once discharged on a *habeas corpus*, can be again taken, is by the process of the court to whom the recognizance is returned, or by a court having criminal jurisdiction, or by a warrant under the hand and seal of a judge, or justice, for a matter or offence not bailable.

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Whether the discharge by the judge was erroneous or not, can make no difference, if he had competent authority to discharge in the case. And a person once discharged by competent authority, can never be again taken, unless in the cases excepted in the act.

Another objection is to the generality of the terms of this commitment. It is for malpractice and contempt, without specifying in what the malpractice and contempt consisted. A commitment, for a contempt generally, or for treason or felony, is bad; for the court, on the return, are to judge whether there be a contempt, treason or felony. In the *Earl of Shaftsbury's case* (1 Mod. 144. *Vaugh.* 14. 2 *Inst.* 52, 53. 55. 6 *Roll.* 218. *Moore*, 839.) the same objection was made to the return to the *habeas corpus*, and though the court decided that they had no jurisdiction, yet they had no doubt that the return was illegal and bad. Sir *Thomas Jones* said, "Such a return, made by an ordinary court of justice, would have been ill and uncertain; but that they ought not to judge of any law, custom or usage of parliament." All the cases where a general return has been supported, have arisen under a commitment by order of parliament, and where the court would not take upon themselves to know or decide on the law of parliament. But the rule on this subject applies to a commitment by the Court of Chancery. For this court has the power to inquire into and decide on commitments *by the chancellor, who has equal power also to inquire into commitments by this court. (*Dr. Greonvelt's case*, 1 *Ld. Raym.* 213.) This is necessary, in order to preserve the liberties of the citizen. Unless the court, then, examine into the original attachment, referred to in the last order, we must avail ourselves of the objection to the generality of the return.

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I shall now proceed to examine the original warrant of commitment, which, if it is not to be considered as a part of the return, may yet be taken into view, as matter *aliunde* appearing from affidavits. There are three objections to this commitment, arising on the return.

1. That the matter laid to the prisoner's charge is a *crime*, prohibited by the statute, and therefore, as such, is not at all cognizable in the Court of Chancery, which has no criminal jurisdiction; nor is it punishable any where by an attachment for a contempt.

2. That the conviction is founded upon evidence which the law does not hold sufficient to warrant a conviction, even for a contempt.

3. That the imprisonment, being in *execution* on *conviction*, should be *definite* and *terminable*, either by effluxion of time, or on the doing of some act by the prisoner: and cannot be uncertain and indefinite, as until the further order of the *authority* inflicting it.

1. In discussing the first objection, it is necessary, for the

sake of the argument, to admit the truth of the facts; but this admission is merely technical, because we are not, in this course of the proceedings, permitted to deny or disprove them.

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By referring to the words of the order for the commitment, it will be seen, that there are many particular facts charged, the whole of which constitute *one offence*. After reciting the particulars, it is ordered, that the prisoner be committed "for the said malpractice and contempt." The whole of the facts form *one malpractice*, *which, because it was a malpractice, is also a contempt. For, on the face of the allegations, it is manifest, that nothing was done by the prisoner which, in itself, directly, was a contempt; but it was so, collaterally, and only because it was a malpractice. If the word "therefore" be inserted in the antecedent sentence, after the word "and," and before the words "in contempt," it will be seen that the contempt was no more than a matter of inference from the misconduct. This one offence, or malpractice, is characterized, as being contrary to the statute, in wilful violation of his duty, as a master, and, therefore, in contempt of the court; and, as the circumstance which constituted the criminality intended to be punished, it is set forth that the prisoner did the acts, specified in the order, "during the time he was a master of the said court."

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The facts alleged have no reference to any nonfeasance or misconduct in regard to acts which he was required and bound to perform, as *master*. The words, "in wilful violation of his duty as master," have, therefore, no truth, unless those acts were a violation of his duty, *because* they were contrary to the statute. The result of the whole allegation is this: The prisoner, by doing certain acts, during the time he was a master of the Court of Chancery, was guilty of malpractice, or an offence against the statute, and, therefore, in contempt of the authority of the court.

The 9th section of the statute (24 Sess. c. 32. *Laws*, vol. 1. 219. 1 R. S. 109.) concerning counsellors, attorneys and solicitors, prohibits masters from acting as counsellors or solicitors in any action or matter in the same court; and the 6th section enacts, "That if any counsellor, attorney or solicitor be guilty of any manner of deceit or collusion, (1 *Rev. Stat.* 109. 2 *Rev. Stat.* 283.) or consenting thereto, whereby to deceive the court or the party, he shall be punished by fine and imprisonment." (See 1 *Com. Dig. Attorney*, B. 14.)

*In consequence of its having been made an indictable offence, it ceased to be cognizable in the Court of Chancery, which has no criminal jurisdiction. That court can, undoubtedly, commit for contempts. It is its ordinary process for compelling appearance, answers, and obedience to its decrees.

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In the case of *Crosby*, (3 *Wils.* 188.) Lord Ch. J. *De Grey*,
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when deciding in favor of the right of the house of commons to commit, and that the court could not interfere, says, "As for the case of the chancery committing for crimes, that is a different thing, because the chancery has no criminal jurisdiction." In truth, this objection is peculiarly applicable to that court where only one judge presides.

But in no court is a criminal matter, which is plainly and obviously the subject of indictment, punishable as a contempt, except a *rescue*, and a breach of the peace, *in facie curiæ*, both of which are direct contempts against the power of the court, in which the criminal matter is merged, if it may be so said, in the atrocity of the contempt.

There is no doubt that a party may be indicted, as well as attached, for a *rescue*. There are some anomalies relative to the cases of rescue, which it is not requisite to take notice of here. Suppose a rescue of a person in custody on a charge of felony, is the rescuer to be proceeded against by attachment? In civil cases there must be a return of the rescue before an attachment will issue. (*Sheather v. Holt*, 1 Str. 531. 6 Mod. 141.) A return of a rescue is a conviction on record, and no attachment can issue until a return, or conviction on record, which is not traversable. (6 Bac. Abr. *Rescue*, E. 3. *Cases temp. Hardw.* 112. Y. B. Hen. VII. 21. pl. 5.) In the case of *Rex v. Philips and others*, (*Barnes*, 429, 430.) it was decided, that as the return of a rescue amounted to a conviction, the attachment was in nature of an execution, or *capias pro fine*, and therefore the party could not be allowed to enter into recognizance, to answer interrogatories on such an attachment. A recognizance *may be allowed, until the action of the party against the sheriff for a false return has been tried.

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In the case of a contempt, *in facie curiæ*, the court is authorized, on its own view of the transaction, to make a record of conviction, and inflict a peculiar penalty, which a mere breach of the peace, in the same degree, would never warrant. So, for an indecent disturbance in the face of the court, it inflicts a fine and imprisonment, which the same disturbance, in any other place, would not justify. As in the case of the *King v. Stone*, (6 Term Rep. 530.) when the jury had acquitted Mr. Stone, a person present threw up his hat and hallooed; he was taken into custody and fined 20 pounds. But cases of both these kinds have three characteristics; 1. They are direct contempts of the power of the court. 2. The enormity of the contempt merges the crime. 3. There is no necessity to establish the truth of the fact by the intervention of the jury. The loss of a trial by jury is no injury to the offender, for as there is no accusation, there can be no plea, or denial of the fact. The whole of the record is a conviction, on view, for matters of which the court have judicial cognizance, the highest certainty of the law.

Setting aside, however, those cases, principle, as well as authority, opposes the summary punishment by attachment, as for a constructive contempt, of indictable offences. In every case of such an offence, the accused is entitled to the intervention of a grand and petit jury, secured to him by the constitution and laws of the land.

The constitution of the *United States*, (Art. 3. s. 2.) says, "The trial of all crimes, except in cases of impeachment, shall be by jury." The constitution of this state, (art. 41.) says, "Trial by jury, in all cases in which it hath heretofore been used in the colony of *New-York*, shall be established, and remain inviolate for ever." And the act concerning the rights of the citizens of this state, declares, "that no citizen of this state shall be taken, or imprisoned, for any offence, upon *petition* or *suggestion*, unless it be by indictment, or presentment of good and lawful men of the same neighborhood where such deeds be done, in due manner, or by due process of law."—Attachment is on a *suggestion*. (See 1 *Bac. Abr.* 282. *Attachment*. 1 *Com. Dig.* 593. *Attachment*.) The clause in the act last cited, does not interfere with convictions on view, or on return of a *rescue*, already mentioned, nor does this act prohibit attachments, except for *offences*. Besides, could the prisoner plead his imprisonment under this warrant, in bar of his being tried for the same offence by indictment? How had he the benefit of the 6th article of the amendment of the constitution of the *United States*, which says, *inter alia*, that in all criminal prosecutions the accused shall have compulsory process for obtaining witnesses in his favor?

These, or similar reasons, have established the same principles in *England*. In *Hawk. P. C. b.* 2. c. 22. (vol. 3. pp. 280. 285.) the various cases are laid down in which jurors may be attached and fined, but in s. 21. and s. 22. certain cases are stated in which, he thinks, they may be fined, *unless an attain lies against them*; and in s. 23. he says, "If a jury shall refuse to find an office for the king, upon full evidence, it hath been holden, that they may be fined, for that, in such case, they are not liable to an attain." Now, an attain is the ancient criminal mode of prosecuting a jury for certain misconduct, and the meaning of all those passages, taken together, is, that jurors may be attached for such misconduct as does not subject them to be proceeded against regularly, by criminal prosecution; but that they cannot be attached for such misbehavior as renders them liable to be prosecuted criminally.

*In the Gaoler of *Shrewsbury's* case, (1 *Str.* 532.) an attachment was moved for against him, for a voluntary escape of one in execution for obstructing an excise officer in the execution of his office; but the court refused to grant it, there being no precedent for that purpose; they, however, ordered him to show cause why there should not be an information.

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In an *anonymous* case, in the same book, (*Ibid.* 384.) two people put in bail, in feigned names, and because there were no such persons, they could not be prosecuted for personating bail, on the statute of *Jac. I. c. 26.* So the court ordered them and the attorney to be set in the pillory.

If we compare the act for regulating attorneys, &c. with somewhat of a correspondent statute in *England*, it may lead to the opinion, that the *English* legislature were aware that the passing of such a law would take away the power of attaching, unless specially reserved. By the 22 *Geo. II. c. 46. s. 2.* if any attorney, or solicitor, should act as agent for a person not qualified, &c., "and complaint be made thereof, in a summary way, to the court from whence such process did issue, and proof made thereof, upon oath, to the satisfaction of the court, then every such attorney, or solicitor, so offending, shall be struck off the roll," &c., "and upon such complaint and proof, the court may commit such unqualified person, so practising, to the prison of the said court, for a time not exceeding one year." Thus, in *England*, when the legislature interfered in a similar case, it expressly gave the power of proceeding summarily, and committing the unqualified person that practised; which our act does not.

Baron *Comyns*, (1 *Com. Dig. Attachment, A. 3.*) in mentioning what is not a contempt, lays it down, that an attachment will not be granted, where there is another remedy, unless that remedy be difficult to obtain. By this he undoubtedly means a civil remedy, where discretion may be exercised. As in the *case of *Hanslow and wife v. Roberts and others*, (*Barnes, 27.*) a motion was made by *Chapple*, for an attachment against *Constable*, for acting as an attorney, without being sworn; and the court denied making any rule, as a penalty of 50 pounds was laid on the defendant, by act of parliament. And in *Stock v. Huggins and another*, (*Rep. temp. Hardw. 106.*) on a motion for an attachment in disobeying an award, the plaintiff having brought an action of debt on the award itself, the court refused to grant the attachment; for as the court would not deliver the party from the attachment, until he had paid the money, the plaintiff would have two remedies, at the same time, for the same purpose.

This principle prevents the case of *Oppenheim, qui tam, v. Harrison*, (*Burr. 20.*) and *Thistlethwaite's case*, (1 *Com. Dig. 594. A. 2. Kyd's ed.*) from being applicable; for the acts, in those cases, would be indictable, under our statute, as a *deceit* practised to "deceive the court."

Again, where part of the act, or offence, is out of the jurisdiction of the Court of Chancery, the party cannot be proceeded against by attachment; but if the different facts stated

in the order, as constituting the malpractice complained of, could be separated, so as to consider each as independent of the others, still the same principle of law would apply, for each of them is indictable under the act: and if so split up, still the punishment is entire, and could it be pleaded in bar, when the chancellor had no jurisdiction? Where a conviction is bad in part, it is bad in *toto*, and the court will discharge a prisoner imprisoned under a judgment, part of which is illegal. (*Rex v. Collyer, Sayer, 44.*)

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2. The conviction is founded on the affidavits of *Samuel Bacon, P. W. Yates* and *Richard S. Treat*, and on no other evidence. This is not the course of the Court of Chancery, nor of any court known to our constitution, nor is it the law in case of a contempt. A party accused has, in most cases, a right to contest a rule to *show cause by his own affidavit. It is in the discretion of the court to issue an attachment or not; but if an attachment issues, it is no more than *process* to bring in the party, to answer to the accusation. He is then either committed, or allowed to enter into recognizance to answer interrogatories, which must be exhibited in a certain time, and on which he is to be examined. This examination is referred to the proper officer, to report thereon whether the party be in contempt. In the courts of law, if the party denies the charge, he is discharged. In chancery, his oath may be contested by the accuser, but still he must be examined on interrogatories, and the master report him to be in contempt. He cannot be *judged*, until the interrogatories have been exhibited. (*Wyat's Pract. Reg.* 135, 136. 1 *Bac. Abr.* 286. *Attachment, B.* 4 *Bl. Com.* 286, 287. 2 *Burr.* 796, 797.) In the case of *Rex v. Edwards* and *Symonds*, (4 *Burr.* 2106. 5 *Term Rep.* 362.) the court say, "The attachment is to bring them into court to answer to interrogatories to be exhibited. There is nothing to plead guilty to, until the interrogatories are filed: neither are they in contempt until *reported* so. There is nothing appearing to the court, at present, whereupon to ground a judgment or fine, or any punishment." In that case the defendants had come in, and applied to be admitted to acknowledge the contempt.

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As the interrogatories are, therefore, essential, in every case, to the conviction, it should appear that they have been exhibited, and that the judgment of the court has been founded on a due consideration of them. It appears, by the return, that the conviction was on the affidavits which have been mentioned. Nothing is said of any interrogatories having been administered. But the court have power to examine into this fact, *aliunde*, for it does not falsify or contradict the return, but merely explains it. Though you cannot falsify a return, yet affidavits are allowable, as to any matters a knowledge *of which would enable the court to decide, whether the prisoner ought to be remanded, bailed or discharged. (3 *Hawk. P.*

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C. 224. b. 2. c. 15. s. 79. Str. 1138. Caldec. 295. 5 Mod. 323. 454, 455. 2 Jones, 222. 1 Sid. 287, 288. 1 Roll. Rep. 337.)

3. The imprisonment in this case is in execution on conviction; and yet it is until the further order of the court. At first blush, this seems contrary to all principle. Commitments before judgment, might, perhaps, be allowed until further order, though even that is not legal; but after the extent of the crime is ascertained, justice and the rights of the citizen require that the sentence which the law pronounces, through the organ of the judge, should be definite and certain. This, most certainly, is an elementary truth in the ordinary cases of criminal jurisprudence.

Hawkins states what ought to be the conclusion of a commitment. The words "to be kept till further order," are sufficient, because they shall be intended of the order of law; "but a commitment till the person who makes it shall take further order, seems not to be good." (3 *Hawk. P. C.* 237. b. 2. c. 16. s. 18.) "The warrant, or mittimus, containing a lawful cause, ought to have a lawful conclusion; viz. and him safely keep until he be delivered by law, &c., and not until the party committing doth further order." (2 *Inst.* 591, 592.) In *Addis's* case, (*Cro. Jac.* 219.) this objection was taken. The gaoler returned to the *habeas corpus*, "that *Addis* was committed to his custody, by warrant from the lord chancellor of *England*, for certain matters concerning the king, there to remain until the lord chancellor delivered him." *Hutton*, Serjeant, objected to the return, as too general, not showing for what cause he was committed, and because he was to remain in confinement until delivered by the chancellor; and although for the first objection, if not for the other, the return was bad, yet the judges answered it was the first time that such objections had been taken, and they would, therefore, consider of the case, of which nothing further is heard.

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*In the case of *Seales* and others, (*Cro. Car.* 557.) the same objection was renewed. *Grimstone* objected to the return in that case, that it was ill to award to prison to remain until further order taken, which is utterly uncertain. A day was given until the octave of *St. Michael*, and in the mean time the prisoners were bailed, but we hear no more of the case. Again, in *Freeman's* case, (*Ibid.* 579.) both the objections which have been stated were made, and the king's counsel seemed to have abandoned it, and elected to proceed by indictment and information.

In *Parker's* case, (1 *Lev.* 230.) the commitment was "till further order," simply. The court held the return good in that point; but they agreed that a commitment until further order of the person committing, was not good; but until further order generally, is all one as by further order of law. This objection, indeed, seems to have been overruled in *Holt*

and *Dighton's case*. (1 *Roll. Rep.* 415. 3 *Bulstr.* 48. 54.) These men had been committed by the high commission court, and liberated once before on *habeas corpus*, with direction to repair to the high commission court, and make submission. They went, accordingly, but refused to answer whether they were willing to take the sacrament kneeling, for which they were committed till the further order of the court. On a second *habeas corpus*, the court, probably, tired of them, not willing to embroil itself with the high commission court, and wishing to get rid of such incorrigible schismatics, refused to bail, or discharge, though this objection was made. Different reasons are assigned in *Rolle* and *Bulstrode*, but neither of them apply to this case. In *Rolle*, the judges say, "The high commission courts have jurisdiction of heresies and schisms, and, therefore, good jurisdiction, and we do not know whether this be not their customary mode of proceeding." In *Bulstrode*, Ch. J. Coke justifies it, because, he says, "Many times the parties are committed *donec* the business *discussus fuerit*."

*As to the first reason, this court does know, and in this case, in this country, is bound not only to know the customary mode of proceeding in chancery, but to examine whether it be conformable to the settled rules established for securing personal liberty. The argument also implies that such a commitment would not be good according to the rules of law with which the judges were acquainted. The second reason, (that it was a commitment, until the business should be discussed,) however bad, is inapplicable to the present case, where the business has been discussed, and the imprisonment is a punishment. Indeed, in most of the cases to be found, the commitment was on *mesne* process, but if it be bad on *mesne* process, *a fortiori*, it must be bad in execution. Allowing a court to commit until the further order of the court, would give it the power of doing indirectly what it could not do directly. Such a sentence, or order, is indefinite and arbitrary.

Such sentences are, however, not without precedent. Most of the books of chancery practice mention the power of committing for contempt, during pleasure, which is tantamount to a commitment, until the further order of the court; and they all refer to the *Practical Register*, (*Wyatt's Prac. Reg.* 134.) as their authority. "For any direct and positive contempt, a party may not only be taken into custody, but committed to the *Fleet*, during the pleasure of the court." The author speaks of direct and positive contempts, such as the present case is not; but in support of his position, he, in his turn, cites *West's Symbolography*, under the title of *Proceedings in Chancery*, s. 32. (*West's Symb* 2d part, 185. b.) The passage in *West* is this: "The proceeding in this court is by the said writs, and by orders, injunctions and decrees, which if the defendant resist, his punishment for this resistance, and for his contempt in not appearing, is imprisonment in the prison of the *Fleet*, as

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is said, during the lord chancellor or the lord keeper their pleasure, or until he will obey and perform the order and *decree of the same court." Thus speaking only of the direct contempts against process, and, at the same time, expressing a doubt as to the imprisonment during pleasure; but, at any rate, coupling it with a limitation that would always enable a party, by his own act, to put an end to his imprisonment. *West*, for his authority, cites the *Year Books*, (37 *Hen. VI.* 13, 14, and 39 *Hen. VI.* 26.) but on recurring to them, there is not a word to be found of imprisonment during pleasure, but only until the defendant shall do certain acts. In 37 *Hen. VI.* c. 14. it is laid down by *Prisot*, Ch. J., their power is to make the party deliver up an obligation, &c., and nothing more, except commit him to prison till he does it; and that is all the court can do; if the party will lie in prison, rather than give up the obligation, the other is without remedy.

The Court of Chancery, therefore, does not appear to have any peculiar power of committing during pleasure, or till its further order; but it may be said that the common law courts claim this power in the case of contempts. They do so; and this case must decide their powers, as well as that of the Court of Chancery; but if the opinion of *Blackstone* (4 *Bl. Com.* 286.) be correct, the mode of proceeding by attachment seems to have been derived to the Courts of *K. B.* and *C. P.* through the medium of the court of equity, and it is important to inquire on what foundation it stood in that court. Indeed the most learned lawyers have been embarrassed to give any color of law to such a power in the courts of common law. Chief Baron *Gilbert* (*Gilb. Hist. Com. Pleas*, 25.) derives the origin of commitment for contempt from the statute of *Westminster 2.* c. 39. which enables the sheriff, when the king's writs are resisted, to take the *posse comitatus*, and to chastise the offenders by imprisonment, from which they should not be delivered, without the special command of the king: and he says, that since the sheriff had that power, the judges who awarded such process must have the same authority to vindicate it. If that be the *foundation of such authority, it can only extend, even in *England*, to contempt of process, as the *Practical Register* lays it down; and it cannot at all extend to this country, where sheriffs never had any such power. *Blackstone* (4 *Bl. Com.* 286.) thinks the process of attachment, or power of summary punishment, must necessarily be as old as the courts of justice, and inseparable, by necessity, from them. As far as that necessity extends, I admit the doctrine; but no necessity requires imprisonment during pleasure. If the offence be completed, its degree of enormity can be ascertained, and there can be no reason why its punishment should not also be ascertained. If the contempt consists in refusing to carry into execution what is required, the commitment may be till the party perform it. I am inclined to think, however, that the

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claim of imprisoning during pleasure, is derived from a source perfectly inapplicable to our form of government, the *royal prerogative*, that is, when it was, in early ages, paramount to the liberties of the people, and from the supposed presence of the king in his courts:—the illegality of the claim has remained unexplored, because the power has not been abused. I am confirmed in this opinion from the commitment by the house of lords, in the *Earl of Shaftsbury's* case, (1 *Mod.* 144.) which was “during his majesty's pleasure, and the pleasure of the house.”

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[KENT, Ch. J. But is not every commitment at pleasure, or without limitation, always understood to be until submission, and is it not in the power of the party to put an end to his imprisonment by submission?]

This power of arbitrary imprisonment is against the genius of our government, and the principles of civil liberty. There is no principle to support such a sentence, except necessity, and I have shown there can be no such necessity, for every possible end of justice, vindicatory *and coercive, may be attained without it, and every case of contempt provided for. There is nothing in the nature of an attachment to warrant such a vague and uncertain punishment. *Blackstone* (4 *Bl. Com.* 283.) justly classes them with summary convictions; but in what respect do summary convictions differ from more regular proceedings? In the *process* and the *proofs*. Their being summary renders them peculiarly serviceable, as ancillary to the courts; but the proceedings being finished, and the conviction once had, there is nothing in the nature of summary convictions to authorize a more informal or arbitrary, and, eventually, a severer and more oppressive sentence, than could be pronounced in the more regular and estimable course of proceeding.

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In the present case, if for the same offence, after an indictment by a grand jury, and a trial by a petit jury, the prisoner had been found guilty, and the same sentence pronounced upon him, he might bring a writ of error, to set it aside. Why should he, then, be without any remedy against the same sentence, following on proceedings which the law and the community regard with more suspicion? And is it in the power of any court, at its option, for an indictable offence, to deprive the accused, without his consent and against his interest, of all those valuable privileges, the protection of a grand and petit jury, compulsory process for witnesses to testify in his favor, a certain and ascertained punishment, and the benefit of a court of error, or of any other mode of being relieved from a judgment which no court could by law be authorized to pronounce on the offence, if it had been made the subject of an indictment?

Cur. ad. vult.

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The court taking time to advise, the prisoner was bailed to appear at the next term. At the last *May* term, at the desire of his counsel, the court deferred giving their opinion, until the present term, when the prisoner was further recognized to appear.

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*YATES, J. It is undoubtedly essential to the due administration of justice, that all courts should have power sufficient to enforce obedience to their own orders; hence the necessity of authorizing them to punish contempts, a power resulting from the first principles of judicial establishments, in the constitutional exercise of which they ought to be protected.

How far this power has been constitutionally exercised, by the Court of Chancery in the case now before us, is the subject of the present inquiry.

I shall not enter into a minute discussion as to the legality of the imprisonment of Mr. *Yates*, under the provisions contained in the fifth section of the act, entitled "An act to prevent unjust imprisonment by securing the benefit of the writ of *habeas corpus*," on the last order of the Court of Chancery, after a regular discharge by a judge. But the exercise of this power, I think, is not warranted by the exceptions stated in that statute, whereby the right of again imprisoning for the same offence is expressly prohibited, "unless by the legal order or process of the court wherein he is bound by recognizance to appear, or other court having jurisdiction of the cause;" clearly meaning such court wherein the prisoner may have been subsequently indicted or charged with a criminal offence. The act, consequently, cannot apply to the Court of Chancery which has no cognizance of such matters, more especially in this instance, where its own acts were implicated, and had been passed upon by a judge acting (in my view of the subject) under the express directions of a positive statute; but as this last order expressly refers to the first commitment, I shall, for the purpose of a more satisfactory investigation, proceed to examine into the validity of the original attachment, appearing on the face of the return now before us.

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In the attachment it is stated, that upon reading the affidavits of *Samuel Bacon*, *Peter W. Yates*, and *Richard S. Treat*, and upon fully considering the subject matter thereof, it satisfactorily appeared to the Court of Chancery, that *John V. N. Yates*, during the time he was a master of the said court, had filed a bill of complaint with *Richard S. Treat*, Esq., one of the clerks of the said court, in behalf of *Samuel Bacon*, as complainant, against *H. Garretse* and *C. Morris*, defendants, and thereto subscribed the name of *Peter W. Yates*, one of the solicitors of the said court, as solicitor, without the knowledge or consent of the said *Peter W. Yates*, contrary to the statute in that case made and provided, in wilful violation of his duty as master, and in contempt of the authority of said court; it was

therefore ordered, by the said court, that the said *John V. N. Yates* be committed for his said malpractice and contempt, to the common gaol of the city and county of *Albany*, &c.

Having thus the return before us, the first inquiry will be as to the nature of the offence of which *Mr. Yates* was convicted; this can be ascertained only from the specification in the attachment.

I am inclined to think, if it had been generally for a contempt, no other court could legally interfere, although authorities have been adduced in support of a contrary doctrine.

In the present case, the Court of Chancery has stated the conviction to be for a breach of an existing statute, and, consequently, for an indictable offence. After particularly mentioning the nature of this offence, the words in the commitment are, *contrary to the statute in that case made and provided, in wilful violation of his duty as master, and in contempt of the authority of the court*; those allegations clearly indicate a violation of the statute only, the words *in contempt of the authority of the court* not entering into or composing the essence of the offence, but being merely words of aggravation; according to the most consistent interpretation I can give to the attachment, *which if correct, the result must be that the Court of Chancery have undertaken to punish for a crime, an offence against the statute, and, consequently, not within its jurisdiction. The proceedings against *Mr. Yates*, therefore, must be void, being *coram non judice*, and his discharge by the judge, when brought before him on the *habeas corpus*, was proper.

This is not the case of a court of a coördinate jurisdiction reviewing the act of its fellow, nor of an inferior controlling the acts of a superior jurisdiction. All courts, as I before stated, have a right to punish for contempts, but all courts have not a right to punish for crimes: the Court of Chancery is of this last description; the process in this case was not within its jurisdiction, but went to punish for a violation of a statute; and this is within the admission of *Ld. Ch. J. De Grey*, who explicitly declares, in the case of the *Lord Mayor of London*, "that if the chancery commits for crimes, it is a different thing from a commitment for contempt."

But admitting that, by the specification in the attachment, the Court of Chancery intended to include the infraction of the statute, and the contempt, it then follows, that both offences have entered into the measure of the punishment inflicted, and that *Mr. Yates* stands committed for the malpractice, in wilfully violating his duty as master, contrary to the statute, on this summary conviction, without the benefit of a constitutional trial to test the verity of the charge; and also for the contempt; the indictable offence for an infraction of the statute being without, and the contempt within, the power of the court;—a manifest inconsistency, yet the only explanation to be given to

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the specification in the attachment, different from the first construction which I have made.

It may be said that this court will not presume that the Court of Chancery contemplated the exercise of an illegal or *usurped authority, and that, therefore, the specification of the crime as against the statute ought not to be taken into view, but should be rejected as surplusage; and that we ought to consider ourselves bound, from the high respectability of that court, to intend the punishment to be for the contempt only, and thus reconcile and determine the question of jurisdiction. To this I can never assent: in a question like the present, involving principles so highly interesting to the community, no other construction or interpretation, in my opinion, is admissible, than such a one as the entire specification of the offence in the attachment will warrant. A different doctrine, according to my view of the subject, might expose a citizen to be punished twice for the same offence, and in its consequences, in other respects, endanger the most important constitutional privileges. The prisoner ought, therefore, to be discharged.

SPENCER, J. The consideration of this case involves questions of the utmost delicacy and importance. On the one hand are presented the conflicting opinions of the chancellor and a judge of this court; on the other, the personal rights of a citizen of the state, holding important and honorable offices under it. My situation renders the task of examining and pronouncing upon the question extremely irksome and unpleasant; but I have no choice; my station imposes the duty on me, and I will not shrink from its performance. It will be readily admitted that in reviewing a question which has been passed upon by one of the highest judicial characters in the state, a question, too, involving a right to exercise a jurisdiction claimed by that character, there ought to be a liberal courtesy; it should not, however, be indulged so far as to lead to a surrender of the prerogatives of another judicial department, nor to the demolition of personal liberty. With these impressions, I enter, reluctantly, *on the questions now before the court. It is not, however, my purpose to examine the various points which have been raised; I shall consider only two of them.

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1st. Whether the commitment of Mr. Yates, after he had been discharged upon *habeas corpus*, for the same cause, was a legal act; and,

2d. Whether he was originally committed for matter whereof the Court of Chancery had cognizance; and if so, whether that commitment was legal.

1. The statute "to prevent unjust imprisonment, by securing the benefit of the writ of *habeas corpus*," requires of the judges of this court, in vacation, to allow the writ of *habeas corpus*, to all persons in custody of a sheriff, gaoler or other person, "other than persons convict, or in execution by legal process."

or committed for treason or felony, plainly and specially expressed in the warrant of commitment;" and it also requires of the judge to "discharge the prisoner on taking his recognizance with sureties, for his appearance at the next court where the offence is properly cognizable," &c. "*unless it shall appear* to such judge, that such prisoner is detained upon a legal process, out of some court having jurisdiction of criminal matters, or by some warrant under the hand and seal of a judge, or justice, for some matter or offence for which, by law, the prisoner is not bailable." It cannot be controverted that a judge of this court, in vacation, is, by virtue of this statute, clothed with all the power, in granting the writ and discharging from imprisonment, which the Supreme Court itself can exercise, in term time. In the cases excepted from the cognizance of a single judge, and where the offence is not bailable, the court itself would not discharge, unless in the single case of extreme illness of the prisoner, and where an enlargement was necessary to preserve his life. This appears to me so self-evident a proposition, as to stand in no need of arguments to enforce it.

*It being, then, the duty of a judge of this court, in vacation, to grant the writ to all persons in custody, excepting to such as are convict, or in execution by legal process, who is to decide whether the person applying for the writ comes within the exception? Undeniably the judge; for as he is to grant the writ to all others in custody, should any person applying for the allowance of a *habeas corpus*, be illegally convict, or in execution by illegal process, such person cannot be denied the benefits secured by the statute.

If cases were necessary to support a proposition deemed so clear, that of the *King v. Collyer and Capon* (*Sayer*, 44. 26 *Geo. II.*) will be found in point. The defendants were convicted at a quarter sessions, upon an indictment for assaulting one *Smith*, and by the order of the court they were committed to prison, for the space of one month next ensuing, and to ask pardon, on their knees, of *Smith*, and to cause an account of the sentence to be printed in the *Daily Advertiser*, and not to be discharged until they had undergone such imprisonment, asked such pardon, and caused such account to be published, and, when discharged, to pay certain fees. The defendants were brought up, by *habeas corpus*, before the Court of King's Bench, and when the above facts appeared on the return to the writ, the defendants were discharged. The court said that every part of this judgment was illegal except the imprisonment, and it would be very hard that the defendants should continue in prison under the illegal parts of the judgment, until they could obtain a reversal of those parts upon a writ of error. It is to be remarked, that in the case cited, no pretence was made that the court of quarter sessions had no jurisdiction; the only ground on which the Court of King's Bench interposed, was, that the conviction itself was illegal.

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If, then, a single judge of this court, in vacation, possesses the same power which the court in term possesses, *here is a direct precedent for saying that a single judge, in vacation, has a right to judge of the legality of a conviction, and if he does adjudge it illegal, to discharge the person suffering imprisonment under it.

Mr. *Yates* having been committed by a process issuing from the Court of Chancery, wherein was set forth the offences of which he had been convicted, was discharged by me, on a *habeas corpus*, on the 19th of *August* last, in which discharge I judicially pronounced the conviction, and imprisonment under it, to be illegal. The Court of Chancery again imprisoned him for the first offence, adjudging my discharge illegal, null and inoperative. He was a second time discharged by me, on the ground of the illegality of the first conviction, and on the further ground that he could not be reimprisoned for the same cause, and he is now a third time imprisoned for the same matter. The inquiry naturally occurs, whence the Court of Chancery acquired a jurisdiction to take cognizance of the legality of my adjudication upon Mr. *Yates's* conviction by that court. I think I have shown that I had cognizance of the legality of the conviction by the Court of Chancery; and, at present, it is utterly immaterial whether my adjudication was erroneous or not. I had a right to make that adjudication by virtue of the *habeas corpus* act. I am unacquainted with any law, or decision, which gives to the Court of Chancery a power to supervise the judgments of this court, or of one of its judges, in a case where a judge has a power co-extensive with that of the court, and to set aside such judgment as illegal, null and inoperative. It is true, the Court of Chancery can relieve after a judgment at law, but such relief can be for some matter only. extrinsic the judgment; it cannot reverse the judgment, but in all respects must consider it right, but for the extrinsic facts of which it presumes the court did not take cognizance. In my view of the subject, the power of the Court of Chancery was spent, *so far forth as respects the infliction of any further punishment on Mr. *Yates* for the offence of which he had been convicted; it could interpose only by mitigating the punishment of imprisonment, which it had adjudged should continue till the further order of the court.

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It seems to me a prostration of all principle, and a perfect anomaly in the law, that a subject upon the legality of which, the legislature has authorized a judge of this court, in vacation, to adjudge and determine, and on which, in the exercise of this plenary power, he does adjudge and determine, that this judgment shall be liable to a review, and to be set aside, in a summary manner, as illegal, null and inoperative, by any other forum whatever. The legislature have conferred no power on any other court to reverse such decision, and the only mode in

which, in other cases, judgments can be reversed, is by regular process in some superior court designated by law.

This case presents still greater incongruity; the same court whose conviction had been adjudged illegal, and after the matter had become *res judicata*, undertakes, of its own accord, and in a very concise manner, to reverse the judgment thus judicially pronounced, and to reinstate its own conviction. I cannot bring myself to believe that the *habeas corpus* act, which, at the epoch of its introduction into *England*, and ever since, has been revered as the bulwark of the constitution, the *magna charta* of personal rights, and which has been successfully exerted against commitments, even by the king in council, is liable to the construction which has been put upon it; a construction which would defeat and mow down those very rights, and that freedom from illegal personal restraints, which it was introduced to uphold and protect.

I, therefore, deny to the Court of Chancery, or any other court, the right to reimprison a person convicted, when the conviction has subsequently been declared illegal, and the party imprisoned has been set at large on **habeas corpus*. Arguments may be urged from the possible abuse of this power, and from the exercise of it by a single judge, against carrying the principles I have advanced so far; but it ought not to be forgotten that any other power, and that all delegated authority, is liable to be abused; but this is no reason against conferring it, nor against its exercise; those who are guilty of abuses are amenable to their superiors.

I have hitherto proceeded on principles drawn from analogy between this and other cases of judicial decisions, and, I trust, have shown that the mode adopted by the Court of Chancery, in setting aside my decision, is altogether novel and incongruous, destitute of precedent, and dangerous, in the extreme, to the liberties of the citizens. I shall now proceed to show that the power exercised by the Court of Chancery is expressly forbidden by statute.

The 5th section of the *habeas corpus* act declares "that no person who shall be set at large upon any *habeas corpus*, shall be again imprisoned for the same offence, unless by the legal order or process of the court wherein he is bound by recognizance to appear, or other court having jurisdiction of the cause." To arrive at a true construction of this section, it must be noticed that by the third section of the act, the judge, in discharging a prisoner, is required to take a recognizance for his appearance at the next court, where the offence is properly cognizable, *which* court, by the terms of the 5th section, may, by legal process or order, again imprison him for the same offence; and upon this obvious principle, that inasmuch as the prisoner, who was charged with an offence, had been enlarged, during the vacation of the court, when it came to sit, it was deemed fit to vest a discretion in the court, to recommit for the

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same offence, in order that the prisoner might be forthcoming to abide a trial. Such power was considered necessary to attain the ends of criminal justice; and it can be exercised *only in the manner and for the purposes already mentioned. The Court of Chancery, I must presume, has considered the words, "or other court having jurisdiction of the cause," as applicable to itself; and that, having had jurisdiction of Mr. Yates's cause, it could reimprison him, notwithstanding his discharge upon *habeas corpus*. I cannot assent to the soundness of this construction; and if it be adopted, it appears to me, that the *habeas corpus* act becomes almost, if not altogether, a dead letter. What, upon the principle assumed, would prevent a justice of the peace, who had committed a person for trial, from reimprisoning him? He has jurisdiction of the cause for the purpose of imprisoning; his power was no more spent by committing, than that of the Court of Chancery in the present case, by its conviction and subsequent commitment in execution. The justice had jurisdiction, and so had the Court of Chancery; in the one case it was exhausted and gone by the commitment to stand trial, and in the other, by the conviction and commitment in execution.

The terms, "or other court having jurisdiction of the cause," must be referred to the preceding member of the section, which, as I have before stated, relates to persons whom the judge, on enlarging upon *habeas corpus*, had bound by recognizance, to appear at the next court, where the offence is properly cognizable; and then that court, at which he was bound to appear, or other court having jurisdiction of the cause, for which he was bound to appear, may imprison for the offence, upon the charge on which he had been set at large on *habeas corpus*. By advertising to our criminal system, the explication of this provision will appear very plainly. In every county of the state, there are two courts of criminal jurisdiction; a court of *oyer and terminer* and gaol delivery, and a court of general sessions of the peace; the former has jurisdiction of offences, committed within the county for *which it is held, of whatever degree; the latter, of all offences, other than those affecting life, or imprisonment in the state prison for life. The judge, in taking a recognizance, when he discharges on *habeas corpus*, is at liberty to bind the prisoner to appear at the one or the other of these courts, as he sees fit, having regard to the periods when they are to sit, and their right to take cognizance of the offence. If the prisoner is bound to appear at a court of general sessions, and it happens that a court of *oyer and terminer* is held in that county, prior to the time when the prisoner has been bound to appear, and it should also happen, that an indictment is presented to such court of *oyer and terminer*, against the person thus enlarged, then that court would gain jurisdiction of the cause, for which the prisoner was bound by recognizance to appear, and it

might, having thus acquired jurisdiction, by legal process or order, commit the individual.

This appears to me the only natural exposition of the power given by the legislature, to commit persons once delivered on *habeas corpus*, for the same cause. But for what purpose did the Court of Chancery regain jurisdiction of Mr. *Yates's* cause, if it be not a perversion of terms, to call it a cause? Certainly, not for the purpose of investigating the guilt or innocence of the party, but merely to reverse a decision judicially interposed, under the notion that it had higher powers, than those conferred by the legislature on a judge of this court. To support a construction, which appears to me to be so monstrous, the words, "or other court having jurisdiction of the cause," are to be insulated, without having reference to the subject just before presented, of a person bound by recognizance, which words evidently point to a person, whose guilt had not been ascertained, and who was yet to stand trial for the offence imputed to him. In the present case, the offence had been examined, and *conviction had taken place, which must be considered illegal, because it had been so adjudged, unless, indeed, the committing court had a right to reverse it.

The legislature have not only forbidden the reimprisoning a person, set at large upon *habeas corpus*, for the same offence, with the exceptions, on which I have commented, but have superadded a penalty of 1,250 dollars, on any person who shall knowingly, contrary to the statute, recommit, or imprison the person set at large, for the same offence. It may be imagined that if the penalty has not been incurred in the present case, then the recommitment is valid and legal. I dissent from such a proposition; it by no means follows, that if the penalty has not attached, that therefore the recommitment is allowed by the statute. The force of such an argument must depend on this, that a court is not a person; and that a court cannot be responsible, *civiliter*, for its acts. In the case of a single magistrate's recommitting for the same offence, the act would be done under the semblance of a judicial authority, and it may as well be insisted that a magistrate would not be responsible. Without intending to express a decided opinion, whether the penalty has attached in the present case, I would observe, that there are cases, in which, if a court shall presume to intermeddle clearly without jurisdiction, the acts done under such usurped authority are not the acts of a court, but of the persons composing it, and they have been held personally responsible. My opinion on the first question I proposed to examine, is, that whether Mr. *Yates* was rightfully discharged or not, upon the *habeas corpus*, his reimprisonment for the same offence was unwarranted by law, and he is now entitled to his discharge.

2. It is, in my view, immaterial to consider the propriety of my discharge, but the occasion seems to require some atten-

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tion to it, and I shall, therefore, briefly review it. I humbly conceive that it can form no objection to the *exercise of the power conferred by statute, that the deprivation of personal liberty which has intervened, comes from the Court of Chancery. If that court has illegally imprisoned a citizen, and it shall so appear to me, while I sustain the office I hold, I cannot withhold the exercise of those functions which the law has given me, in affording a remedy. An upright and an independent judge cannot balance between his personal inclination and his duty.

I shall now consider, 1st. For what offence Mr. *Yates* was committed; 2d. Whether, if the conviction partakes of some matters cognizable by the Court of Chancery, and of some of which it has no jurisdiction, there was a just cause of deliverance on *habeas corpus*. In considering these points, I shall regard the attachment only, without admitting or denying the right of examining evidence *aliunde*. When Mr. *Yates* was brought before me, I examined collateral evidence, in conformity to what I understand to have been a very usual practice with the judges of this court. By examining *aliunde*, I do not mean the admission of evidence, contradicting the return, but explanatory of it. I forbear that examination on the present occasion, being satisfied that the opinion of his honor the chancellor, delivered when the first attachment was awarded, will not materially aid in ascertaining the cause of the commitment.

The offence imputed to Mr. *Yates* is, that during the time he was a master of the Court of Chancery, he had filed a bill in a cause, and thereto subscribed the name of *Peter W. Yates* as solicitor, without his knowledge or consent, and had acted as a solicitor in his name, in the prosecution thereof, *contrary to the statute in such case made and provided, in wilful violation of his duty as master*, and in contempt of the authority of the court; and he was committed until further order, *for his said malpractice and contempt*. It appears to me, that there are two distinct *offences; 1st. For having filed a bill, in the name of a solicitor of the court, and as an aggravation thereto, having done so without his consent; and, 2d. That at the time when this act was done, Mr. *Yates* was a master in chancery, and that the act thus done was consequently contrary to the statute, and in wilful violation of his duty as a master. For the first offence, the court could undoubtedly proceed as for a constructive contempt; with respect to the latter, in my opinion, the court had no jurisdiction.

There is no statute prohibiting the use of a solicitor's name by another person, though there is a prohibition in the case of an attorney. (1 vol. *R. L.* 221. 24 sess. c. 32. s. 7. 1 *Revised Statutes*, page 109.) There is a statutory inhibition to a master of the Court of Chancery, against acting as solicitor in any action or matter in that court; hence there cannot remain

a doubt that the violation of the statute ascribed to Mr. *Yates*, consists in his having filed the bill in the name of a solicitor, during the time he was master.

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It is an elementary principle, that where an act is done contrary to the provisions of a statute forbidding it, an indictment will lie, unless the legislature prescribes a specific forfeiture. I forbear to give any opinion whether the act done by Mr. *Yates*, exposed him to an indictment. The Court of Chancery has proceeded on the principle that he had violated the statute; if so, he certainly was indictable. What puts this matter beyond all controversy is, that Mr. *Yates* is committed "for his said malpractice and contempt." This could not mean that as solicitor of that court, he had been guilty of malpractice, for it no where appears that he was a solicitor of the court; it can have reference to nothing else, than that, as a master of the court, he had wilfully done an act contrary to the statute, and in wilful violation of his duty, because it was contrary to the statute. It follows, that the Court of Chancery has undertaken to punish a master of that court, whose commission is derived from the *council of appointment, for his malpractice, in violating a statute, for which, if the statute has been violated, there exists, in a court of competent jurisdiction only, a power of punishing the individual.

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This leads to the inquiry whether the Court of Chancery possesses criminal jurisdiction. I believe it only necessary to state that it has not that jurisdiction. The organization of that court, its proceeding according to the civil law, without the power of convening a grand or petit jury, renders its exercise of criminal jurisdiction incompatible with every idea of personal safety or liberty.

That relief can be afforded by *habeas corpus* where the conviction contains some good and some bad matter, the case of the *King v. Collyer and Capon*, already cited, shows. The only difference between that case and this, is, that here one of the grounds of the conviction is out of the jurisdiction of the court, and there it had jurisdiction of the whole complaint, but made an illegal sentence. The effect on the individuals is the same in both cases; the one suffered for a matter of which the court had not cognizance, the other for an excess of authority in the judgment. But it cannot be intended that the Court of Chancery would have inflicted the same punishment for a constructive contempt only, which it would for a contempt and also for a wilful violation of a statute by a public officer, contrary to his duty. That both matters entered into the judgment of the court, is manifest to my mind, because both are carefully recited, and he is committed for both. How, then, can they be separated, and the Court of Chancery be presumed to act on one, when it professes to act on both? It appears to me as absurd to uphold a conviction founded upon good and bad matter, when the punishment is awarded on

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both, as it would be to support a judgment at law, founded upon distinct matters, some of which were actionable, whilst others were not.

*It has been intimated, that the Court of Chancery is a court of such high jurisdiction, that it was incompetent for a judge of this court, either to intermeddle with its process, or question the legality of its proceedings. With all due deference for such an opinion, I cannot subscribe to it. In every case arising upon *habeas corpus*, it would seem to me, that the sole inquiry ought to be, Is the prisoner legally or illegally in custody? and not, What court committed him? I am warranted in this position by the opinion of Chief Justice *Tylghman*, in *Olmstead's* case; Mrs. *Sergeant* was brought before him on *habeas corpus*, and it was insisted by the counsel for *Olmstead*, that she was not entitled to her discharge, even if the judge was of opinion that the district court, by which she was committed, had no jurisdiction. He declared his opinion to be, that in the case supposed, he would have a right, and it would be his duty to discharge the prisoner.

On these principles, if the cause was before me, anew, and separated from the question of recommitment, I should pronounce the conviction bad, and that the prisoner was entitled to his discharge.

KENT, Ch. J. The return to the *habeas corpus* has imposed upon the court the necessity of discussing and deciding some interesting questions. We are called to examine into the validity of the commitment of the Court of Chancery, into the authority of a judge of this court, to interfere, in vacation, upon *habeas corpus*, and to set aside such commitment. It is also made a question, whether the act of the judge, be not, at all events, conclusive upon the subject matter of the commitment. This inquiry is, in every view, important, and I shall endeavor to acquit myself of my public duty, by bestowing upon the case, a free, full and diligent investigation.

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*A preliminary question was raised, and reserved upon the argument, which must be disposed of, before we enter upon the consideration of the merits.

The sheriff returns, not only the order of the Court of Chancery, of the 5th of *December*, by virtue of which he took, and now holds the prisoner; but the order of the 5th of *September*, upon which the prisoner was retaken, after the first discharge by the judge, and also the attachment of the 17th of *August*, upon which the prisoner was originally committed.

Unless the attachment is to be received as part of the return, we cannot examine into the legality of the original commitment, nor into the legality of the discharge of the prisoner by the judge. The counsel for the prisoner have contended, that the whole return ought to be received, as pertinent, and in

order. The last order does not specify in what the contempt and malpractice therein mentioned consisted, but it refers to the writ of attachment, as containing the true cause of the commitment. This order declares the discharge by the judge to have been illegal and void, and it evidently considers, that the prisoner ought to be reclaimed, by virtue of the attachment, and that the recommitment is to be sustained upon that original process. If the discharge was null and void, this construction was correct, and the prisoner is in, as from the first commitment. The sheriff could not, then, return the true cause of the caption and detention of the prisoner, without stating the attachment, as well as the subsequent orders; and I am, accordingly, of opinion, that the whole return ought to be received.

1. The first point raised by the counsel for the prisoner is, whether the discharge of the judge be not conclusive and final, so as to preclude the Court of Chancery from examining into the correctness of the discharge, and from recommitting the prisoner for the same cause.

*The *habeas corpus* act, among the exceptions, states those of "persons convict, and in execution by legal process," as being entirely out of the purview of the third section, under the authority of which the *habeas corpus* was awarded. And if the prisoner, when he was discharged, was a person answering to either of those descriptions, the judge had no authority to bail or discharge him, and he ought to have been immediately remanded. If such a prisoner should be discharged, the discharge cannot be binding or valid, for this would be placing power without law, upon the same foundation with power exercised according to law. A proceeding without jurisdiction is void, and a mere nullity. The judge, in this case, derived all his authority from the statute, and that does not apply, and of course does not make his discharge binding, if the prisoner came within one of the exceptions stated.

The 5th section of the act which prohibits reimprisonment, for the same offences, of persons discharged upon *habeas corpus*, most evidently applies only to cases in which the writ and discharge were had, pursuant to the statute. And even this prohibition extends only to magistrates acting individually, in vacation, and does not extend to any court having jurisdiction of the cause of the commitment. Such courts are expressly excepted from the prohibition, and of course retain the same powers as before the passing of the statute. If, then, the attachment had in itself been so defective, as not to have been sufficient to have held the prisoner, the Court of Chancery might still have awarded a new and competent warrant of commitment, for the same cause, for which the first warrant issued, provided the case was one of which that court had jurisdiction

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In *Alphonso's* case (2 *Bulstr.* 259.) the Court of King's Bench admitted that this might be done. He was committed by the college of physicians, for practising physic, and was brought into the King's Bench *upon *habeas corpus*; and all the court held the return insufficient, as no cause for the commitment was stated. But they agreed, that, "if they should discharge him, for the insufficiency of the return, then the college would presently take him again, and commit him, and then would amend their return, and make it better."

It was the decision of a majority of the judges who gave their opinions, to the house of lords, in 1757, on several questions relative to writs of *habeas corpus*, that at common law, and before the statute of 31 *Charles II.* no judge could regularly issue a writ of *habeas corpus*, in vacation; and even now, under the statute, the judge has no means to enforce obedience to the writ, but by referring the case to the court, out of which the process is supposed to issue. It would then be extremely incongruous and singular, if the act of a judge in vacation, which he has not authority to execute, was to have the force and effect of a final judgment, pronounced in the last resort, and conclude all other jurisdictions within the state. Such a power would be dangerous as well as unprecedented. A single judge of this court might, in that case, annul the decision of the rest of the court, by discharging, in vacation, a person committed by the judgment of the court. A power of this extent would ride over all the courts of the land, and become perfectly despotic, if it was not subject to review and correction. There is no trace of its existence to be met with in the books, and the only colorable ground for the conclusiveness of the discharge of a prisoner, upon *habeas corpus*, is the provision contained in the 5th *sec.* of the *habeas corpus* act; and that provision, as we have seen, is limited to cases properly arising under the act, and in no respect extends to courts of competent jurisdiction.

[* 358] There are numerous instances, in which the Court of K. B. and some cases, in which the Court of C. B. has, *upon *habeas corpus*, undertaken to examine and decide upon the cause and the authority for the commitment by another court. But in all those cases, the *habeas corpus* was awarded by the court, and returnable therein; and except in a few anomalous cases, in the time of *James I.*, and of which I shall take notice hereafter, the examination into the authority of the court to commit, arose upon commitments by some inferior court. (12 *Co. Chauncey's* case. 1 *Roll. Rep.* 245. *Codde's* case. *Cro. Car.* 567. *Crawley's* case. 2 *Bulst.* 139. *Hodges v. Mayor of Liskarett.* *Styles*, 90. *Smith's* case. *Vaug.* 135. *Bushell's* case. 1 *Salk.* 348. *Bethell's* case. 1 *Ld. Raym.* 99. *Bracy's* case. 1 *Ld. Raym.* 213. *Greonvelt's* case. 1 *Ld. Raym.* 545. *King v. Chandler.* *Stra.* 794. *King v. Elwell.* *Sayer*, 44. *King v. Collyer and Capon.*) They were all cases of *habeas corpus*, at 300

common law; and I apprehend, that there is not an instance in the *English* law, of a judge in vacation undertaking to decide upon the legality of a commitment in execution, by the judgment of any court of record, and much less, of a court of the highest degree.

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The powers granted by the *habeas corpus* act, to a judge in vacation, were never intended to apply in any such case, because cases of that kind appear to be carefully excepted in the statute; and it was not requisite to include them, for the purpose of guarding against arbitrary and groundless imprisonment. The statute seems, with a studied precaution, to have declared that the powers granted to a judge in vacation time, were not to affect cases of imprisonment, under the authority of a competent court. In the first place, "*persons convict, and persons in execution by legal process,*" are not to apply to a judge for the allowance of a writ of *habeas corpus*. In the second place, a judge is not to discharge the prisoner brought before him, if it appears that he is detained "*upon any legal process, out of a court having jurisdiction of criminal matters.*" And lastly, if "the prisoner be set at large, the prohibition to reimprison him for the same offence, does not extend to any "*court having jurisdiction of the cause.*" It appears to me, to be unfit, and dangerous to the orderly administration of the law, for a single judge, in vacation, to be charged with a summary and plenary power of review of the judgments and executions of a regular court of justice. The abuse of the powers of the established courts was never, in any period of our law, so grievous, as to require such a prompt control. And, perhaps, as much, and more danger was to be apprehended from the abuse of such a remedy, than from the abuse of the original power.

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The uniform practice, under the statute of *Charles II.* appears to have coincided with the construction which I adopt; and which strikes my mind, as founded on the strongest principles. This settled practice ought to govern and conclude us; for our *habeas corpus* act is almost a literal transcript of the statute of *Charles*. The act of 1787 followed the *English* statute, *verbatim*, and the revised act of 1807, made only some slight abbreviations in the mode of expression, which cannot, without violence, be construed to alter, in the least degree, the sense and settled construction of the former act. That the "mere change of phraseology," in the revised laws, was not to work a change in the established interpretation, was the unanimous decision of the Court for the Correction of Errors, in 1805, in the case of *Taylor v. Delancy*. (2 *Caines's* cases in error, 150, 151.)

There seems to be a degree of propriety and consistency in a superior court of appellate jurisdiction taking cognizance, upon the return of a writ of *habeas corpus*, of the legality of a judgment and commitment, in an inferior court: but for a sin-

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gle judge to possess such a power, to be exercised in vacation, in a summary manner, without argument of counsel, and upon the judgment and *commitment of any and of every court in the state, would be an alarming innovation upon our judicial system.

If, therefore, upon the return of a writ of *habeas corpus*, awarded in vacation, it appears, that the prisoner stands committed by the judgment of a court of record, or other court of competent authority, the judge is bound, immediately, to remand the prisoner; and he has no power to examine and decide, touching the legality of the judgment, or the jurisdiction of the court. These questions belong to the cognizance of this court, as possessing general appellate powers, and as having the supreme control of all inferior courts.

The relief granted upon *habeas corpus*, against defective convictions and commitments, is, in some respects, analogous to the relief obtained upon a writ of error. It is, in one respect, more desirable, because it is more prompt in relieving the prisoner from imprisonment; but, on the other hand, it leaves the order, or judgment of the court below, in full force, and only discharges the party from the present effect of it. Before *Bushell's* case, no person was ever delivered by *habeas corpus*, or without a writ of error, from commitments by a court of *oyer and terminer*; and, since that time, the courts will not, unless the judgment or commitment be manifestly bad in substance, relieve on *habeas corpus*, but put the party to his writ of error. (*Bethell's* case, 1 *Salk.* 348. and *King v. Collyer and Capon, Sayer*, 44.)

My opinion, on the first point raised in this case, accordingly, is, that the discharge which took place in the vacation, was in no respect conclusive, either upon the Court of Chancery, or upon this court; and I am also of opinion, that, if the first commitment was good, the recommitment was equally lawful, for that the discharge was unauthorized and void, inasmuch as it was not in a case within the provision of the *habeas corpus* act, and because a judge in vacation has no authority, either under the act, or without it, to review, and set aside, as *illegal and void, a formal commitment and conviction by the Court of Chancery.

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I shall next proceed to examine the merits of the present application, as appearing upon that part of the return, which sets forth the original warrant of commitment, and as unconnected with any thing which took place subsequent to the first execution of the attachment. The case is now to be considered, as if this was the first writ of *habeas corpus*, which had been sued out by the prisoner.

The counsel for the prisoner submitted to the court three objections to the legality of the original warrant of commitment, and they contended, that upon either of the grounds, the commitment was illegal, and that the prisoner ought to be

discharged. I shall examine these several objections in their order.

1. It is said, that the matter laid to the charge of the defendant, was a misdemeanor prohibited by the statute, and not cognizable in chancery, and that the conviction and imprisonment were for that offence, and not for a contempt of the court.

The attachment recites a previous order of the court, in which it was declared, that the defendant, during the time that he was a master, filed a bill in the name of one of the solicitors, and had acted as solicitor in the prosecution of the bill, in the name of the person, "contrary to the statute in that case made and provided, in wilful violation of his duty as master, and in contempt of the authority of the court." Here is a plain and specific statement of the cause of the commitment, and I feel no difficulty in saying, that it was a palpable case of contempt, of which the court had jurisdiction. That the court meant to proceed on the ground of the contempt, appears from the charge in the order, which amounts to a conviction for a contempt, and from the subsequent part of the order, directing the prisoner to be committed "for his said malpractice and contempt." *I cannot perceive, in this order, any color for the inference, that the Court of Chancery assumed a criminal jurisdiction, distinct from the jurisdiction which that court has over contempts. Why should the court have done it? The offence was, in itself, a contempt of that court. This point cannot well be controverted. For an officer in chancery to practise as a solicitor, in the name of another solicitor, was malpractice and contempt; and to do it without the knowledge or consent of such other solicitor, was a more aggravated malpractice and contempt, for it was a gross fraud. The order does, indeed, go on to say, that such conduct was "contrary to the statute in that case made and provided, and in wilful violation of his duty as master." And are those words to warrant the inference, that the court intended to depart from the exercise of its undoubted jurisdiction in the case of contempts, when it had a contempt fully before it, and to usurp the criminal jurisdiction of a court of law? Is such a conclusion necessary, or even tolerable, when resting on such grounds, and applied to such a court? The inference would be very severe, and one which I could never indulge, even if the order stopped there. But when we connect this paragraph with the words which follow, "and in contempt of the authority of this court," and when we add the order thereon, that the party be committed "for such malpractice and contempt," the intention of the court appears to me to be manifest.

The statute, which the court is supposed to have alluded to, is the act entitled "*An act concerning counsellors, attorneys, and solicitors*," which declares, that no master in chancery shall act as solicitor in any action or matter in that court. A viola-

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tion of this prohibition, by a master, may possibly be indictable, on the ground that every contempt of a statute is indictable, if no other punishment be prescribed. But an offence against this statute, may also be a contempt of the court, though indictable; *and the court may punish the contempt. A great part of the contempts which may be committed against a court of justice, are indictable offences; such, for instance, as assaults committed in the presence of the court, resistance to its process, and libels upon the court or its suitors, in respect to matters pending before it. Because the offence is indictable, that circumstance does not, in any case, destroy the right of the court to proceed against the party for the contempt, provided the act complained of amounts to a contempt.

One *Habin* acted as an attorney in the K. B., in the name of a regular attorney of the court, without the authority of such attorney, and the court granted an attachment against him. (1 *Burr.* 20.) Yet *Habin* seems to have been as liable to indictment for that conduct, as the present defendant; for the statute of 2 *G. II. c. 23. s. 1*, which was then in force, had declared, that no person should be permitted to act as attorney, until admitted and enrolled in the court. It was as much a contempt of the Court of Chancery, for the master to have acted as solicitor, after the prohibition in the statute, (admitting him to have been a solicitor before he was master,) as it would have been for any individual without admission, to have acted as solicitor. *The statute suspended the authority of the previous license*, so long as he continued a master of the court; and to act as solicitor, in defiance of the statute, was also acting against the will and in contempt of the court.

Every illegal and unauthorized interference with the process or proceedings of a court, is clearly a contempt of such court, whether that illegality be created by statute, or be declared by the rules and practice of the court. This is a principle so well settled, as to become elementary. The Court of Chancery was therefore bound, in respect to its own character, and the rights of its suitors, to animadvert, as for a contempt, upon a master, for practising as solicitor, contrary to the statute; because, *as far as relates to the punishment for contempts, a court of chancery is as much a court of criminal jurisdiction, as any court of law.

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The case stated in the return was not an ordinary violation of a statute, of which the courts of common law have exclusive cognizance. It was a violation which carried with it, of necessity, the commission of a contempt. It was a violation of a law *relative to proceedings and practice in chancery*, and committed, upon the records, and in the very heart of the court, by one of its officers. This gave the court cognizance of the case, as a contempt. The conduct of the prisoner, as set forth in the order, was a fraud, practised upon a suitor of the court, and it

was an abuse by practice, which tended to injustice, deceit and oppression.

"The law," says Serjeant *Hawkins*, (b. 2. c. 22. s. 2. and 12.) "gives all courts of record a kind of discretionary power over all abuses, by their own officers, in the administration or execution of justice, which bring a disgrace on the courts themselves, as not taking sufficient care to prevent them;" and he says, that the court may proceed by attachment not only against attorneys, sheriffs, &c. but against any other officer of the court, for any act of disobedience or injustice, that concerns the practice of the court. Lord Ch. Baron *Comyns* lays it down generally, that "an attorney, being an officer of the court, if he attempts any thing which he cannot, or ought not to do, it will be a contempt of the court, for which an attachment shall go." (*Tit. Attorney*, B. 13.)

The malpractice of officers, if frequent or unpunished, reflects dishonor on the administration of justice, and creates among the people a disgust against the courts themselves. This is the true ground of that salutary and indispensable discretion, with which the courts are invested, of controlling and punishing all kinds of abuse and lawless practice, in every officer belonging to their jurisdiction. If we were then to admit, as the counsel for the prisoner contended, that the prisoner was attached for violating the statute, I should be of opinion, that the attachment was proper, for the statute could not be violated, without involving, in the breach of it, a contempt of the court, any more than a breach of the peace can be committed, in the presence of a court, without including in the commission of it, a contempt of such court.

But it is clear, from the facts stated in the order, that the Court of Chancery did not convict the prisoner of a contempt on the principal point, that, being master, he had acted as solicitor. If that had been the ground of the contempt, much of the detail in the order would have been omitted, as superfluous. The averment, that while he was master he had acted as solicitor, by filing the bill, would have been sufficient. But an offence, certainly not within the statute, is set forth, and that is subscribing the name of *Peter W. Yates* to the bill, without his knowledge or consent, and carrying on the cause in the name of *P. W. Yates*. This is the strong and prominent *gravamen* set forth in the order, and it is a grievance and contempt, which the statute did not reach. It was essential to the dignity of the court, and to the purity and regularity of its practice, that such conduct should be noticed and punished. The animadversion was indispensable.

I have hitherto considered the objection on the supposition, that the act of the prisoner did really amount to an indictable offence under the statute. The counsel argued the case on this assumption, and, indeed, without it, the objection which I have been considering, would at once fall to the ground. But I

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wish here to be understood, as not giving any decided opinion on this point. It will be time enough, when the question shall necessarily *call for an opinion. The words of the statute are, that no *master shall act as solicitor* in any action; and strictly speaking, the prisoner did not act as solicitor, but he acted as agent for and in the name of another solicitor. The statute had reference to acts done directly by a master, in his own name, as solicitor; and this intention is made evident by a recurrence to the act of the 20th February, 1787, where this prohibition is first to be found. The act intended to render that practice unlawful, which was lawful before. Practising in the name of another solicitor was always malpractice, and punished as such by the courts. It is a fraud practised both upon the solicitor and the court, and there is no need of a statute prohibition. If such conduct was within one of the mischiefs that the statute had in view, the power of the courts was adequate to meet and redress it. If the statute does in fact reach this case, it is so far a declaratory provision, and perfectly useless.

But if this court is to review the legality of the conviction in chancery, we ought, at least, to give the language of it a sound and liberal interpretation, and every reasonable intendment should be made in support of the jurisdiction of that court. This has grown into a settled maxim. In *Bethell's* case, (1 *Salk.* 348.) Lord *Holt* and the other judges agreed, that the return was not regular or formal, but as it appeared that the prisoner was committed by a court having jurisdiction of the matter, he was remanded. Serjeant *Hawkins* (*B. 2. c. 15. s. 73. 76.*) lays it down as a general rule, that whenever the contrary does not plainly and expressly appear, it shall be presumed that the commitment was legal; and he adds, that the superior courts pay the highest regard to one another's proceedings, and will presume them to be agreeable to law, unless the contrary appear, or the case be very extraordinary. We are then bound to say, that if a competent authority be shown, no *words of equivocal import, in drawing up the order, can or ought to affect it. To set aside the conviction, as *coram non iudice*, because the order declares the act of the prisoner to be against the statute, and his duty as master, as well as in contempt of the court, would be to adopt a construction rigorous beyond example. *Utile per inutile non vitiatur*. In the case of *Huggonson*, a printer, (2 *At.* 469.) who was adjudged by Lord *Hardwicke* guilty of a contempt in publishing a defamatory libel upon certain persons who had made affidavits in chancery, the lord chancellor takes great pains to prove the paper a defamatory libel, or in other words, an indictable offence, and he concludes with declaring it also a contempt of his court, for which the party was committed, according to the common order of the court in such cases. I believe it was never supposed that Lord *Hardwicke* usurped jurisdiction, and that his commitment

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was void, because he showed a paper to be a libel, as well as a contempt. Those words were thrown in, to denote the aggravation of the case; but the exercise of the power of the court was justly applied to the contempt, and not to the libel.

As to the manner of drawing up orders in chancery, his lordship observed, in the case of *Baker v. Hart*, (2 Atk. 489.) that he wished the orders of his court were framed with the same simplicity, as orders made by the courts of law. They usually contain a recital of the principal facts; and this habitual want of precision, in chancery orders, may account for some superfluous expressions in the present case, though the order of commitment for "malpractice and contempt," was agreeable to the usual course. The word *malpractice* is an appropriate term for a contempt committed by an attorney or solicitor, in abusing the practice of the court; and the most that can be said of the order before us is, that it uses two words of synonymous import, to express the same idea.

*The return then shows, evidently, that the proceeding and commitment in chancery was for a contempt; and on this subject it may be useful to look into the *English* decisions.

Several cases arose in the time of *James I.* in which the Court of K. B. discharged persons upon *habeas corpus*, who were committed by the Court of Chancery for contempts. In the cases of *Astwick* and *Apsley*. (Moore, 839, 840. 1 Roll. Rep. 192.) the cause and particulars of the contempt were not set forth, so as to enable the Court of K. B. to exercise its *assumed* power, to judge of the sufficiency of the contempt, and this is said to have been the reason for the discharge in those cases. And therefore, in *Allen's* case, (Moore, 840.) as the cause of the contempt was given, viz. in not performing a certain decree, therein made, the prisoner was remanded. But even this did not satisfy in *Glanville's* case, (Moore, 838. 3 Bulst. 301. Cro. Jac. 343.) for there it appeared, by the return, that he was committed by the Court of Chancery, for breach of a decree, and yet he was discharged by the Court of K. B. which held the decree illegal; and this decision led to an open struggle between those courts for jurisdiction; for *Glanville* was afterwards committed by the Court of Chancery, for the same cause, and again delivered by the Court of K. B.

Respecting the authority of these cases, Serjeant *Hawkins* (B. 2. c. 15. s. 76.) remarks, that as to the Court of K. B. bailing persons, committed by the Court of Chancery, little is said in the books, except in the reign of *James I.* when Lord *Coke* was Ch. J., and when there was great heat and contest between those courts, and several persons committed by chancery were bailed by the K. B. But he adds that he had not met with any late precedent of the kind, and he intimates, that the long disuse of such proceedings had lessened the authority of those cases. In another place (2 Bl. Rep. 757.) they are called hasty decisions. *They arose out of a violent contest, con-

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cerning which it is has been uniformly admitted, that the Court of K. B. was wrong; and that Lord *Coke's* conduct was not only erroneous but intemperate. Those cases ought not, therefore, to be cited, as precedents, and especially since they are counteracted by the whole current of subsequent decisions.

In the very next reign, we find the court adopting different principles, and pursuing a more moderate course of conduct, and one more consistent with the privileges of other courts. This appears from *Chambers's* case, (*Cro. Car.* 168.) who was committed by the star chamber, for a contempt, and upon being brought into the K. B. on *habeas corpus*, he was remanded, and the court said, that "it was not the usage of that court, to deliver one committed by the decree of one of the courts of justice." In a subsequent case, in that reign, (*Cro. Car.* 579.) one *J. S'*, who had been committed by the exchequer, for not paying a fine, was brought up by *habeas corpus*, and remanded, "because the commitment was by a judicial court."

In the case of the *Earl of Shaftsbury*, (2 *St. Tri.* 615. 1 *Mod.* 144.) who was imprisoned by the house of lords, for "high contempts committed against it," and brought into the K. B., the court held that they had no authority to judge of the contempt, and remanded the prisoner. The court, in that case, seem to have laid down a principle from which they never have departed, and which is essential to the due administration of justice. This principle, that every court, at least of the superior kind, in which great confidence is placed, must be *the sole judge*, in the last resort, of contempts arising therein, is more explicitly defined, and more emphatically enforced, in the two subsequent cases of the *Queen v. Paty and others*, and of the *King v. Crosby*. In the first of those cases (2 *Ld. Raym.* 1105.) the majority of the court determined, that they had no jurisdiction over the case of *a contempt adjudged in the house of commons, and they said that warrants of commitment, for a contempt both in chancery and the K. B. were short, without specifying particulars, and yet such warrants were suffered, for there was a difference between a commitment for a crime, and for a contempt.

In *Crosby's* case, (3 *Wils.* 188. 2 *Bl. Rep.* 754.) the language of the judges is singularly impressive. He was committed by the house of commons, for a breach of privilege, and brought up on *habeas corpus*. The point strictly before the court, and decided, was the same as in the preceding case; but the subject unavoidably led the judges into the consideration of adjudications for contempts committed in the courts of justice. Their clear exposition of the law, on this head, did not partake of the nature of *obiter dicta*, but they were solemn and deliberate opinions of the whole court, two of the judges of which have, perhaps, never been surpassed in their distinguished reputation for talents and learning. Lord Ch. J. *De Grey* observed that "when the house of commons adjudge any thing to be a con-

tempt, or a breach of privilege, their adjudication was a conviction, and their commitment in consequence, was execution; and that no court could discharge or bail a person that was in execution, by the judgment of any other court." "It was not the practice of the courts in ordinary cases, to take cognizance of such executions, or of commitments of that kind, and there was no precedent of *Westminster Hall* interfering in such a case. That it was held in a case in the *Year Books*, that every court should determine of the privilege of that court. That if the Court of C. B. should commit a person for a contempt, the Court of K. B. would not inquire into the legality or particular cause of commitment, if a contempt was returned, for in this respect, the courts were coördinate. That the courts of K. B. and C. B. never discharged any person *committed for contempt, in not answering in the Court of Chancery, if the return was for a contempt. That if the Court of Chancery, or the Admiralty Court, commit for a contempt, no other court discharges the persons committed. That in Ch. J. *Wilnot's* time, a person was brought by *habeas corpus* into C. B. who had been committed by the Court of Chancery of *Durham*, and that court being competent, and having jurisdiction, the man was remanded. That perhaps a contempt in the house of commons, in the chancery, in the C. B. and in the court of *Durham*, might be very different; and therefore every court must be sole judge of its own contempts. That if the C. B. could determine upon the contempts of any other court, so might the other courts of *Westminster Hall*; and what confusion would then ensue? Abuses may be made, for which there is no remedy, but this was unavoidable; and it was better to leave some courts to the obligation of their oaths. That in the case of a commitment by the K. B. or C. B. there was no appeal. That if the courts should abuse their jurisdiction, it would be a public grievance, and redress must be sought from the legislature. That if the two houses of parliament also, as well as the courts of law, should abuse the powers which the constitution has given them, it would be a public grievance. That the constitution had provided checks, to prevent its happening; it must be left at large; it was wise to leave it at large; some persons, some courts, must be trusted with discretionary powers; and though it is possible, it was in the highest degree improbable that such abuses should ever happen."

Mr. Justice *Blackstone* pursued the same train of observation, and declared that all courts, by which he meant to include the two houses of parliament, and the courts of *Westminster Hall*, could have no control in matters of contempt. That the sole adjudication of contempts, and the punishments thereof, belonged exclusively, *and without interfering, to each respective court. That infinite confusion and disorder would follow, if every court of the *hall* should have power to examine the com-

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mitments of the other courts for contempts. That the judgment and commitment of each respective court, as to contempts, must be final, and without control. It was a confidence that might, with perfect safety, be reposed in the judges and the houses of parliament. That the objection as to abusive consequences, proved too much, because it was applicable to all courts of *dernier resort*, and general convenience must always outweigh partial inconvenience.

I have cited the opinions of these judges much at large, because I could not hope to improve upon the strength of their observations ; and I entertain the most perfect conviction, that the law, as they declared it in this case, was well understood, and definitively established, as part of the common law of *England*, at the time of our revolution. Mr. Justice *Grose*, many years afterwards, (8 *Term Rep.* 325.) thought he did enough to prove the settlement of the law on this subject, by merely quoting this very able decision of Lord Ch. J. *De Grey*.

2. But admitting that the prisoner was committed for a contempt, his counsel have contended that the conviction was bad, because it was not founded upon sufficient evidence, as it is not stated in the order, that the prisoner was examined upon interrogatories.

It does not appear upon the return, whether the prisoner was, or was not, examined upon interrogatories. The order is silent as to that fact, and it is by inference only that the counsel can draw such a conclusion from the return. Assuming that the prisoner was not examined, and that this court was authorized to review the proceeding, I am not prepared to say that such an examination was indispensable. This would depend upon the usage and practice of the court, and it must rest upon sound discretion, in each particular case ; for it is a settled rule in chancery, that if the defendant be examined on oath, touching a contempt, his denial is not conclusive, and the court will examine witnesses on both sides, and decide according to the weight of testimony. There is, then, no reason that the party charged in chancery with a contempt, should be entitled to claim as a matter of right, to purge himself upon oath, because such purgation is no acquittal, as it is at law. (4 *Bl. Com.* 284. *Doug.* 516.) But it is a decisive answer to this objection, that we have no authority to inquire upon this return into the proceedings in chancery, prior to the conviction. It is enough for us that we see, on the face of the return, an adjudication or conviction for a contempt, and a commitment in pursuance of such conviction. By what means the Court of Chancery arrived at the adjudication, we are not to inquire, for this court is not intrusted by the constitution with the power of sustaining appeals from chancery. We can only act judicially upon the facts appearing upon the return. We have not the proceedings and evidence before us ; and to sit

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here in judgment upon them, with only *ex parte* suggestions and arguments to guide us, would be extravagant. I disclaim any such power. We are bound to presume, that the prosecution for the contempt down to the conviction, was duly conducted; and I entertain a persuasion, from the character of the court, that if all the facts were fairly before us, they would demonstrate the moderation and regularity of the proceedings. It is sufficient for us here, that we see by the return, a conviction for a contempt, and a commitment by a court of competent authority.

3. The last objection taken to the sufficiency of the return is, that the prisoner was committed until the further order of the court.

*It was admitted that this is the usual form of the order of commitment for a contempt in chancery, as well as in the courts of common law. If we are all in an error upon this point, it is time that the practice was revised; but it would ill become this court to discharge the prisoner, by reason of an exception which applies equally to the practice of this court, and which has been established in all the *English* courts, and in the two houses of parliament, from almost time immemorial.

The counsel for the prisoner traced the chancery practice, as laid down in the *Practical Register*, and in *West's Symbolography*, back to the period of the *Year Books*, to show that it had no foundation there. But it would be extremely unwise to overset an established practice and course of precedents, because such a remote origin cannot be shown. Our most valuable institutions could not endure so severe a test. The forms of administering justice, in all their practical details, have undergone essential changes and vast improvements. The time of the *Year Books* was, even at *Westminster Hall*, a time of comparative ignorance and barbarism; and if precedents from that infant period of our law, were admitted to control the cultivated jurisprudence of the present day, they would degrade, or at least tarnish, the character which it now enjoys, in the maturity of its age, and the height of its prosperity.

The practice of commitments for contempts, during pleasure, prevails in the house of assembly of this state, (*Colony Journals*, v. 2. 510. and *State Journals* for 1796,) as well as in the house of commons in *Great Britain*. It has become too deep rooted and inveterate a practice for us now to correct; and I am persuaded that there exists sound reasons for the universal adoption of it, and that it has not been found, upon experience, to be injurious to the liberty of the subject. The objection is, *at this time*, new. It was taken in the *Earl of *Shafsbury's* case, and also in that of *The Queen v. Paty and others*; but in the latter case, though Ch. J. *Holt* objected to the sufficiency of the return, he took no notice of this objection; and Mr. Justice

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Powys said that a commitment during the pleasure of the house, was more favorable to the prisoner, and more for his benefit, than a commitment for a certain time, as it leaves to the house a power to discharge the prisoner upon his submission. He said that it was agreeable to the constant forms of commitment by the commons; and was conformable to the commitments by the K. B. which are implied to be during the pleasure of the court. (2 *Ld. Raym.* 1108.)

If the time should be definite in the sentence, the court could not alter it, even upon the submission of the party; and it would operate rigorously upon him. The courts would feel obliged to commit for a time adequate to make due reparation for the contempt, without any submission. It is the established course, in the courts of law and equity, and in the legislature, to receive the submission of the party, whenever he is ready to offer it, and on reasonable satisfaction made, to discharge him. The party offending ought to submit, and the form of the order is the most effectual way to ensure it. There is no such thing as an abuse of this power in modern times. The case probably is not to be found. An alarm cannot be excited at its existence, in the extent now laid down. It is given to the courts, only for their preservation, in order to enable them to repel insults, to protect suitors, to support their process, and to be an asylum from violence and oppression.

The judicial is, from its very constitution, the feeblest department in government. "*Des trois puissances,*" says *Montesquieu*, "*dont nous avons parlé, celle de juger est en quelque façon nulle.*" (*L'Esprit des Loix*, liv. 11. c. 6.) It is so checked, and so controlled, that it cannot essentially abuse its powers. The tendency of the times is rather to induce the courts to relax, than increase in the severity of their ancient discipline, to exercise their power over contempts with extreme moderation, and never to resort to it, but when urged by the most commanding necessity. Sound discretion must use and apply the power we have been considering, and sound discretion is and must be confided to the highest tribunals, on this subject. The trust is given to the courts, not for themselves, but for the public, who are deeply interested in the preservation of this power, in its accustomed vigor.

I am, accordingly, of opinion, that the prisoner must be remanded.

VAN NESS, J., and THOMPSON, J., were of the same opinion.

The Court, thereupon, made the following order:

Ordered, that the said *John V. N. Yates* be remitted to the custody of the sheriff of the city and county of *Albany*, to re-
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main in the same state in which he was at the time of the issuing of the said writ of *habeas corpus*.

Motion denied. (a)

(a) The prisoner having been bailed to appear at this term, he was called, and not appearing, his recognizance was ordered to be estreated.

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August, 1806.
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*THE PRESIDENT and DIRECTORS of the MANHATTAN COMPANY against LYDIG. [*377]

THIS was an action of *assumpsit* for money had and received to the use of the plaintiff; being the sum of 1,452 dollars, paid by the plaintiffs to the checks or drafts of the defendant, between the 19th March and the 20th July, 1803, inclusive. The cause was tried at the New-York sittings, in November, 1806, before Mr. Justice Tompkins.

The plaintiffs proved the payment of the checks in question, and the deficiency in the deposits of the defendant, during the period above-mentioned. From the regulations of the bank, as to the mode of transacting business, it appeared, that it is the duty of a clerk in the bank, called the *receiving teller*, to receive all the moneys deposited in the bank; and when received, to enter the amount, with the name of the person for whom it is received, in a book, called the *cash book*. In case of the absence or sickness of the *receiving teller*, some other clerk is appointed to act, temporarily, in his place; and occasionally, when there is an unusual press of business, some other clerk acts as an assistant teller; but there is a particular place in the bank appropriated for the teller, where all money is regularly paid, and the person who acts as teller is to receive deposits at that place only. It is the duty of the *book-keeper* to keep the ledger only, and to post from the cash book, kept by the teller, all entries of cash into the ledger. He has no right to receive

*money; but there have been instances, where a book-keeper, on account of a great pressure of business, has assisted the receiving teller, or supplied his place during his absence or sickness.

Where an account has been settled, though it cannot be opened generally, yet it may be opened for the purpose of falsifying particular items.

A clerk in the bank, who acted as a book-keeper, and whose particular duty it was to keep the ledger, into which the entries are copied from the *teller's cash book*, received money from A., who was a dealer with the bank, for the purpose of having the same deposited in the bank, and which he entered in the ledger, and afterwards, into the dealer's bank book, but

[*378] which was not received by the teller, or entered in his cash book, and was supposed to be

embezzled with other moneys by the clerk, who absconded; it was held, that the clerk, in making the deposit, was the agent of A. and not of the bank; and that A. must be answerable for the deficit in the deposit.

Whether due diligence was used by the bank, to detect the fraud of the clerk, is a question of law; if the bank take the usual and customary mode, to detect the frauds or mistakes of its clerks, it will be sufficient evidence of due diligence.

If a dealer with the bank, send his bank book, with the money to be deposited, and the clerk enters the amount to his credit, in the bank book, at the time the deposit is made, it is conclusive on the bank; *aliter*, if the deposit is first made, and the entry is afterwards copied from the ledger into the dealer's bank book.

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Each dealer with the bank is furnished with a small book, commonly called his bank book, in which his accounts with the bank are stated; and when any deposit is to be made, it is regular to send this bank book with the deposit, and the person acting as receiving teller enters the amount of the deposit in the book, at the time it is made. Sometimes, however, this little bank book is not sent; and when that happens, the book is afterwards written up, and the entries of the deposits made from the ledger; in which case the entries always appear in the hand-writing of the book-keeper, whose duty it is to write up and balance the dealer's bank book. This book, and the money to be deposited, are frequently sent by the clerks of the persons dealing with the bank. The regulations above-mentioned are established by the bank, of which no special notice is given to those dealing with it.

It appeared that one *B. Brower* was a book-keeper in the bank, during the above periods; and that, in that capacity, he kept the ledger A. to L. inclusive, in which was the account between the defendant and the bank. On the 19th *March*, 1803, there appeared to be a credit in the ledger to the defendant, of 882 dollars and 75 cents, and which credit was made in the hand-writing of *Brower*; but the sum was not entered in the cash book, kept by the teller. On the 21st of *March*, 1803, a similar credit appeared in the ledger, in the hand-writing of *Brower*, for 75 dollars and 50 cents, which was not entered in the teller's cash book. On the 20th *July* following, there was a similar entry in the ledger, in the same hand-writing, of the sum of 293 dollars and 17 cents. On the 19th and 21st *March*, the receiving teller was at his place in the *bank, and he testified, that the sums of 882 dollars and 75 cents, and 75 dollars and 50 cents, credited to the defendant in the ledger, were not received by him, nor, to his knowledge, by any other clerk in the bank, nor were they entered in the cash book.

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On the 20th *July*, one *Jones*, since deceased, acted in the place of the teller; and the cash book of that day did not contain any entry of the said sum of 293 dollars and 75 cents; but all the money delivered over by him, as received on that day, on being counted, at the closing of the bank, corresponded with the entries in the cash book. On the 11th *May*, 1803, the defendant was credited in the ledger kept by *Brower*, with the sum of 900 dollars; but the sum deposited, and entered in the cash book, was 800 dollars only; and on the 13th *June*, a credit was entered to the defendant, in the same ledger, for 190 dollars 87 cents, when the sum deposited and entered in the cash book, was only 90 dollars and 87 cents.

All the sums above-mentioned were entered in the bank book of the defendant, produced at the trial, in the hand-writing of *Brower*; and the account, in the same book, had been balanced three times, between the 19th *March* and the

20th July, 1803, to wit, on the 22d March, the 20th May, and the 27th June: once by a clerk, who acted for *Brower*, in his absence, and twice by *Brower* himself, whose duty it was, as keeper of the ledger, to cast up and balance the books. In doing this, the practice is to transcribe from the debtor side of the ledger, all sums drawn for by checks of the dealer, who is credited with all sums not before entered in his bank book.

This bank book is the only document or evidence that the dealer with the bank has of his transactions with the bank; it is a request of the bank, that it should be sent often to be written up and balanced; and the dealer accordingly sends his book to the bank, where it remains until it is written up and balanced, by the clerks of *the bank. This is done by comparing it with the ledger, inserting all the debts and credits, and stating the balance as it appears in the ledger; and when thus balanced, it is returned by the bank, to the dealer.

When the bank book was written up, in the absence of *Brower*, it happened in the following manner: The plaintiffs sent a notice to the defendant, that his account was overdrawn; and the deficiency claimed by the plaintiffs was immediately paid; this was on the 27th June, 1803.

A dealer's bank book, belonging to *R. G.*, was produced, in which were several entries of sums deposited to his credit, in the hand-writing of *Brower*, on the day when the receiving teller appeared to be in his place in the bank, and which deposits were also entered in the cash book. It happened that once, on the 7th December, 1802, an entry was made in the same bank book, of a deposit of 150 dollars, to the credit of the same dealer, in the hand-writing of *Brower*, and which was entered in the ledger; but no entry thereof was made in the receiving teller's cash book, though it appeared that the teller acted in his place on that day, and not *Brower*.

It appeared that *Brower* eloped from the city on the 17th August, 1803; having fraudulently taken money from the bank, to the amount of 10,000 dollars.

According to the regulations of the bank, it is their uniform practice, in the course of the day, or during the next day, to compare the entries in the cash book, with the entries in the ledger; and this is done by the receiving teller, and the clerk who keeps the ledger. Once a month, a committee of the directors examine the cash in the bank, to see that it corresponds with the cash account, in the cash ledger, rendered by the book-keepers, each of whom renders a balance-sheet, which is compared with the cash account. Prior to the elopement of *Brower*, these accounts corresponded; but when his *fraud was discovered, it appeared, that in order to cover the fraud, he fabricated false balance sheets, corresponding with the entries in the cash book, but not with those in the ledger.

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Sometime after *Brower's* elopement, the defendant told a witness, that he had received a letter from *Brower*, informing him, that he, *Brower*, had committed a fraud, in keeping the defendant's account with the bank. On this intimation, the whole account was critically examined; and on such examination, the fraudulent entries above stated, were discovered. By a similar course of examination, which, however, was not usual, the bank might have detected the fraud at any time.

After this examination, the defendant was informed of the result, who answered, that he had employed *Brower*, as a writer, to post his books. At first he wrote in the evening, but he afterwards came to write in the morning, before 10 o'clock, when the bank opened; that when *Brower* left the defendant's house to go to the bank, he would frequently ask him if he had any money or notes to send for deposit; that he sent money by him to be deposited, and that he might have been ruined; which the witness understood, to refer to his intrusting *Brower* to carry money to the bank. It appeared that *Brower* had been formerly a clerk to the defendant, and was recommended by him to the bank, and was employed on that recommendation. *Brower* then sustained a good character, and was a confidential clerk in the bank. It was agreed that the defendant was a man of fair character, and wholly ignorant of any fraud committed by *Brower*, until informed by the above-mentioned letter. When *Brower* was admitted as a clerk in the bank, he gave a bond, with surety, for his good conduct, in the sum of 2,000 dollars, which bond is in force.

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*The defendant had said to one of the witnesses, that he could not account for the errors in his bank book, unless it was from his occasionally intrusting *Brower* to carry money to the bank, and which he never deposited.

It appeared that *Brower* lodged a note in the bank, for collection, given by *J. H.* to the defendant, for 208 dollars, which was endorsed by the defendant, and afterwards by *Brower*; that the note was entered in the little bank book, in the name of the defendant, for collection, in *Brower's* handwriting; and when it became payable, it was withdrawn by the defendant, and delivered by *Brower* to a clerk of the defendant.

After the bank had received intimation of the frauds committed by *Brower*, in the account of the defendant, the cashier made several alterations, in red ink, in the defendant's bank book, which had been left by him, denoting the entries to which the bank objected, as erroneous, and returned the book, so altered, to the defendant; but this was done without his knowledge or authority.

The judge told the jury, that the bank was not chargeable by the dealer, unless the sums for which the credit was claimed, were delivered to the receiving teller, or to some person acting in his stead, or as his assistant, or came into the coffers

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of the bank, or unless they had become chargeable in this case, in consequence of the fraud or improper conduct of *Brower*, as their book-keeper; and he submitted to the jury, to determine, first, whether the money for which the credit was claimed by the defendant, had been delivered to the proper clerk, or received into the bank, in which case the plaintiffs ought not to recover; and, secondly, if the money had been so received, whether the bank had used due diligence in detecting and rectifying the frauds and mistakes of *Brower*, their book-keeper, in the accounts balanced and returned by the plaintiffs to the defendant; *if they had used due diligence, the loss must be sustained by the defendant, and the verdict ought to be for the plaintiffs; otherwise, the loss ought to be borne by the plaintiffs, and a verdict be given for the defendant.

The jury found a verdict for the defendant. A motion was made to set aside the verdict, and for a new trial, on the following grounds:

1. Because the money now claimed by the plaintiffs, was never paid into the bank by the defendant.
2. Because the plaintiffs are not responsible for the fraud or misconduct of *Brower*, and the payments, if any were made to *Brower*, were made at the peril of the defendant.
3. For the misdirection of the judge.
4. Because the verdict is against law and evidence.

Hoffman, for the plaintiffs. 1. The mode of transacting business with the plaintiffs is the same as is practised in the other banks of the *United States*, and is well known to all persons dealing with the bank. The teller is known to be the person authorized to receive all deposits. The book-keeper is a distinct clerk, whose sole and proper duty it is to post the entries made in the teller's cash book. The proof is conclusive, on this point, at least for the sum of 987 dollars; for that amount was not paid at the proper and appointed place. If the payment was irregular, it is incumbent on the defendant to prove that the money actually came into the hands of the plaintiffs. The law will not presume that it came into the coffers of the bank, unless it was paid at the proper place, in the usual and regular mode. There ought, therefore, to have been a verdict for the plaintiffs, at least for the amount of 987 dollars. And as to the evidence of the payment of the 293 dollars, there is not sufficient proof of a payment, to warrant the finding of the jury.

*2. *Brower* was the agent of the bank, only as a book-keeper, except on special occasions, when he was intrusted to receive money in the place of the teller. In all the instances in which he received money from the defendant to deposit in the bank, he was the agent of the defendant, not of the plaintiffs; for his fraud, therefore, in relation to such sums, the defendant, not the plaintiffs, must be answerable. Again, the moneys

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delivered by the defendant to *Brower*, were not received by him in the banking room. The only sum for which there is any evidence of its having been paid in the bank is 293 dollars.

3. The charge of the judge was not correct. There was no want of due diligence on the part of the plaintiffs, who proceeded according to the usual course in such cases. But if the plaintiffs are not answerable for the fraud of *Brower*, who, in regard to the money received, was the agent of the defendant, then the question about due diligence cannot arise. Again, whether due diligence or not, is a question of law, (1 *Bos. & Pull.* 389.) and not of fact, and, therefore, not proper to be left to the jury. In a case of fraud, the doctrine about due diligence does not apply; but if the fraud be proved, the law will afford a remedy, notwithstanding the lapse of time. The most plausible objection is, that by suffering the book to be balanced three times, the bank adopted the acts of *Brower*. But the original fraud was in *Brower*, the agent of the defendant, and the balancing of the book was a continuation of that fraud.

Though, generally speaking, a settled account cannot be opened, yet it may be, where you can lay your finger on the errors, or items falsely charged. The rule is the same in equity as in law. If this may be done as to a mistake, *a fortiori*, it ought to be allowed where there is fraud. (2 *Atk.* 113. 119. 2 *Bro. C. C.* 62. 3 *Anstr.* 769. 4 *Ves. jun.* 118. *For. Ex. Rep.* 157. 6 *Ves. jun.* 485. 1 *Salk.* 282.)

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**S. Jones, jun.* and *J. Radcliff*, contra. *Brower* was the general and confidential agent of the plaintiffs, who are responsible for the fidelity and honesty of the clerks they employ in the business of the bank. When the question arises, which of two innocent persons must bear a loss, by the misconduct of a third person, it must be borne by him who gave the trust and confidence. The rules relative to the mode of doing business in the bank, were made for their own convenience and security, and cannot affect or vary the rights of the dealers with the bank; but it appears that the plaintiffs allowed of deviations from these rules, at various times, by permitting a book-keeper or other clerk, to assist the teller, or to act in his place. It is proved that *Brower* was permitted to act as teller, and to receive money brought to be deposited. Having allowed him once to act in that capacity, the plaintiffs can never be permitted, afterwards, to object that he was not a teller, or not authorized to receive money.

The general principle is, that the bank must be responsible for the acts of their clerks and agents, unless they publish to the world, that particular clerks are authorized and intrusted by them, to do certain specific things; for otherwise, how are strangers, dealing with the bank, to know whether a particular clerk is acting within the scope of his authority or not? There

is no evidence, except as to two sums, that the defendant ever trusted *Brower* to carry money to the bank, to be deposited. In those instances, he was the agent of the defendant, no further than to carry the money to the bank; when in the bank, he was the agent of the plaintiffs, and it was there he committed the fraud.

We do not deny that a settled account may be opened, in case of mistake or fraud, where such mistake or fraud is imputable to the person against whom the relief is sought, by opening the accounts; but that is not the case here.

*The dealer's bank book, as it is called, is kept by the plaintiffs and their agents. If *Brower* was not their agent to make the original entries, he was, undeniably, their agent in balancing this book, from time to time, because that is admitted to be the peculiar duty of the book-keeper. The settlements in this bank book are the only evidence allowed or given to the defendant of the state of his account; and having been made by the proper agent of the plaintiffs, must be considered as conclusive against them, unless they can show a fraud in the defendant himself. These settlements deliberately made, from time to time, are an adoption of the acts of *Brower*, who was the regular agent of the plaintiffs, in keeping the account, and comparing it with the ledger; and any frauds committed by him in that capacity, must undoubtedly be charged to the bank. Again, the plaintiffs took security for the fidelity of *Brower*, as their agent; they ought, therefore, to bear the loss arising from his misconduct, and look to their security for an indemnity.

Due diligence or not, is a question of law, in relation to certain commercial transactions; but generally, it is a mixed question of law and fact. The judge did no more than give his opinion as to the law, and then leave it to the jury to find the fact; if they found that the plaintiffs had been remiss and negligent, then, by law, they ought to bear the loss.

T. A. Emmet, in reply. The true question is, whether the money was deposited in the bank, or not. This is a principal fact to be proved, and which has been assumed by the counsel for the defendant. The evidence of the fact, is an entry in the cash book, and an entry in the ledger, which is no more than a copy of the cash book. If the ledger is not an exact copy of the cash book, it is so far incorrect. If the defendant had sent his bank book with the money, and had demanded the book of **Brower*, he would have been able to have detected the fraud immediately. The original entry by the teller in the bank book, is no doubt conclusive against the bank; but where the bank book is not sent with the money, an entry is made in the teller's cash book, which is copied into the ledger; and when the dealer's bank book is, afterwards, sent to the bank to be written up, these entries are copied from the

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ledger into it, by the clerk who keeps the ledger. They are nothing more than copies from a copy; they are no evidence against the plaintiffs that deposits were made.

The presumption is, that the money was never deposited, otherwise the receiving teller would have known it. If *Brower* made false entries in the ledger, when no money, in fact, was deposited, such entries can never give a right against the bank. It is the original entry only in the dealer's bank book, that gives him a right against the bank.

I deny the principle, that the bank is answerable for all the acts of their clerks in the bank; they are responsible only for such acts as are done by them, in their proper capacities, or places for which they are appointed. As well might the bank be made responsible for money delivered to the door-keeper, to be deposited. This is not a case where two persons are equally losers. The defendant is a gainer by the fraud of *Brower*.

SPENCER, J., delivered the opinion of the court. If the defendant's account with the bank be considered as balanced by the officers of the bank having competent authority for that purpose, as it appears to me it must; still the cases of *Vernon v. Vaudry*, (2 *Atk.* 119.) and *Brownell v. Brownell*, (2 *Bro. C. C.* 62.) are authorities for saying, that though the whole account cannot be opened after such a lapse of time, yet that the particular items may be falsified.

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This case turns on the point, whether, in respect to some of the false credits given to the defendant in the *ledger, and from thence transcribed into the defendant's bank book, *Brower* did not act as the agent of the defendant in making the deposits; and whether, as such, he was not enabled to commit the frauds, of which the plaintiffs complain.

It is certain that the defendant did send money by *Brower*, at several times, to make deposits; and if it can be ascertained, that, in discharge of that trust, he falsely obtained credits for the defendant beyond the amount deposited, so far I think the defendant liable. *Brower* was the servant of the plaintiffs, when in their employ, and in their office; and for acts there done, the plaintiffs are answerable; (1 *Salk.* 282.) but for acts not done in execution of the authority given him by the plaintiffs, they are not chargeable. In making deposits for the defendant, *Brower* acted, not as the servant of the plaintiffs, but as the agent of the defendant, and the defendant would be answerable for any deficit in the deposits, in the same manner as though he himself had been guilty of a fraud in making them.)
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The judge fairly submitted it to the jury to decide, whether the money for which credit was claimed by *Lydig*, had been delivered, or received into the bank. If it had, he observed, that the plaintiffs ought not to recover. This part of the charge appears to me correct. The second position stated to the jury was, that if the money had not been so received, then whether the bank used due and proper diligence, in detecting and rectifying the frauds or mistakes of *Brower*, their book-keeper, in the accounts balanced and rendered to the defendant, would be a material inquiry; and if the plaintiffs had used due diligence, the loss must be sustained by the defendant, and the verdict ought to be for the plaintiffs; but if they had not, then the loss ought to fall on them, and the verdict ought to be for the defendant.

The latter position, I think incorrect in this, that the question of due diligence was left at large to the jury, *without any opinion expressed by the judge, and because I perceive no grounds on which to found the charge of a want of due diligence on the part of the bank. The examinations at the bank, by the committee of directors, were in the usual way; and the frauds practised by *Brower* eluded detection, by his fabrication of a false balance sheet. It is not for the court to point out the mode banks are to pursue to detect frauds; but if they take the usual and uniform method, adopted not only by this, but I presume by other banks, they cannot be subjected to the charge of negligence. There is no proof, that the other banking institutions pursue a different method; and I therefore think it fair to conclude they do not.

I have said, that particular errors in accounts may be inquired into, and rectified, though the whole account may not be liable to be opened, with respect to accounts kept by individuals with a bank; but in my mind there is this exception; if the dealer's book accompany the deposits, and the credit be then given, when the deposit is made, it becomes an original entry, and would be conclusive on the bank; if, however, the book is sent to be written up afterwards, it is not an original entry, and may be examined into.

The result of my opinion is, that the jury were misdirected on the point of negligence on the part of the plaintiffs. It should not have been submitted to them as a question of fact; and, as it was so submitted, their verdict, for aught we know, turned on that point, and for that reason there ought to be a new trial.

The court are, accordingly, of opinion, that there must be a new trial, with costs to abide the event of the suit.

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v.
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KER.

*JACKSON, *ex dem.* HARDENBERGH and others, *against*
D. L. SCHOONMAKER.

Neither a de-
scent east, nor
the statute of
limitations, will
bar or affect
the right of a
remainder-man,
or reversioner,
during the con-
tinuance of the
particular es-
tate; nor will
the acts or
laches of the
tenant of the
particular es-
tate, affect the
party entitled in
remainder. An
entry to avoid
the statute, must
be an entry, for
the purpose of
taking posses-
sion. What acts
amount to an
adverse posses-
sion or a dis-
seisin.

THIS was an action of ejectment for lands in the town of *Rochester*; it was tried at the *Ulster* circuit, before Mr. Justice *Van Ness*, and a struck jury; eight of the jurors having been on a *view* of the premises.

The plaintiff offered in evidence a will of *Josephat Dubois*, dated 4th *September*, 1757, and it was proved by showing that the witnesses were dead, and proving their hand-writing; and that the testator died on the 12th of *September*, 1757. The judge decided, that an estate for life was thereby given to *Fijatie Dubois*, the testator's widow; and after her death, the fee of the lands was given to his three daughters; *Maria*, the wife of *Hendricus Hornbeck*, who died without issue; *Cornelia*, wife of *I. G. Hardenbergh*, one of the lessors; and *Catharine*, since married to the other lessor, *Jonas Hasbrouck*. The two first sisters were married in the life-time of their father. *Catharine* married shortly after his death; but whether under age, or not, did not appear. *Maria* died after her husband, leaving a mother. By the will, if either daughter died, without issue, her share was to go to the surviving sisters, or sister, in fee. The testator's widow died about the autumn of 1792. (a)

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*A deed from *Leonard Cole* to *Josephat Dubois*, dated 30th *October*, 1751, and acknowledged, was read in evidence; and the plaintiff proved, that the grantor was reputed in the family to have been the eldest son and heir at law of *Leonard Cole*, senior; and that his father was dead.

The plaintiff then gave in evidence, the record of a deed from *Rosekrans, De Witt* and *Wynkook, trustees of Rochester*, to *Leonard Cole*, dated 17th *November*, 1714, acknowledged, 30th *December*, 1751, by *De Witt*, one of the grantors, before a judge of the court of common pleas, at his chambers.

The plaintiff also produced a deed from *Leonard Cole*, son and heir of *Leonard Cole*, senior, to *Josephat Dubois*, dated 8th *November*, 1730, for other lands than the premises, but reciting them to be part and parcel of the land of *Leonard Cole*, senior.

(a) The words of the will were as follows: "I further give, devise and bequeath unto my three well beloved daughters, as namely, *Maria Hornbeck*, wife of *Hendricus Hornbeck*, *Cornelia*, wife of *Johannis Gerard Hardenberg*, and *Catharine Dubois*, all my lands, tenements, &c., to be equally divided among them: each the just third part thereof, *six weeks after the decease of my dearly beloved wife Fijatie Dubois*, or as soon as she marries, she is to quit all claim, of this my above-mentioned estate; but as long as she remains my widow, she is to remain in full possession, and master, &c. Provided, nevertheless, if any of my above-named daughters should come to die, or decease, without heirs of their own issue, then their, or either of their shares, shall be equally divided among the survivors of them, or each or either of their heirs."

The plaintiff then proved, by *Guesbert Krom*, a witness aged 85 years, that from the age of 13 to 33, he lived about half a mile north of the premises; and when about 18 years of age, he saw a patch of clearing and a *skepple sowing*, along the south side of *Stoney Kill*, near where young *Jacobus Schoonmaker* now lives, and upon which it appeared that corn had before been planted: that young *Leonard Cole* lived where *Jonas Hasbrouck* now lives.

Jacob Quick, aged 48, testified, that the servants of *Fijatie*, the widow of *Dubois*, some time before her death, cut wood, and made rails, on the south side of *Stoney Kill*, and between that and the *Mill Brook*, nearly south of young *Jacobus Schoonmaker's*; and that *Jonas Hasbrouck*, one of the lessors, who lived with his mother-in-law, the said widow, had made mill-stones, south of the *Creek Mill*, 19 or 20 years ago; and that the inhabitants of *Rochester* claimed the right of cutting wood and breaking stone, on the lands in *Rochester* not enclosed.

Samuel Freer testified, that he had, by permission of the widow *Dubois*, cut wood south of *Stoney Creek*, in 1790 or 1791, and that his father, who was a freeholder, and inhabitant of *Rochester*, had also cut wood there by her permission.

John A. De Witt testified, that he had made a map of the tract, comprehended in the deed from the trustees of *Rochester* to *Leonard Cole*, senior, on which the *Stoney Kill*, *Mill Brook* and *Sander's Kill* were laid down from actual survey; and that the premises in possession of the defendant were between *Stoney* and *Mill Kill*, and the plaintiff claims them by virtue of the deed, from the trustees of *Rochester* to the elder *Cole*, which comprehended all the land between the *Stoney* and *Sander's Kill*, from their junction up to *David Dubois's* south-west corner, on the *Stoney Kill*, and a line from thence, south, to the *Sander's Kill*. In 1792, he surveyed the said tract, and found a marked tree, which was boxed in presence of the jury; and the marks appeared to be 51 years old, and the tree 180 years. The tree answered to the description in the plaintiff's deed. There were two other trees, apparently marked at the same time.

The plaintiff having here rested his cause, the defendant's counsel moved for a nonsuit, on the ground, that no title had been shown in *Leonard Cole*, senior, and that no possession had been proved; but the motion was overruled.

The defendant proved by *F. Schoonmaker*, aged 69, that Captain *Joakim Schoonmaker* was one of the trustees, named in the patent of *Rochester*, and lived on the north side of *Stoney Creek*, within a quarter of a mile of it, where his son *Joakim* afterwards lived; that the three sons of *Joakim* had, as long ago as he could recollect, established divisions between their respective parts on the land possessed by them, on the south side of the *Stoney Creek*; they possessed lands improved to the *Mill Creek*; some of the family had a fence beyond it,

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extending to *Sander's Kill*. *John*, a grandson of Captain *Joakim*, was in possession of the land occupied by the defendant; and was in possession when the witness was 10 or 12 years old; some of his fence was along the *Stoney Kill*, and south-west from the *Stoney Kill*, to the *Mill Creek*, nearly as the fence now runs: south of this, the land was claimed, as part of the 180 acres granted to Captain *Joakim*, by the town of *Rochester*. *John* died in possession, before, or during the war. *John*, the son of Captain *Joakim*, had once cleared land along the *Stoney Kill*, being about 20 or 30 acres, the outside fences of which are now the same as when he first knew it. He had also seen a fence, extending to *Mill Creek*, from the *Stoney Kill*, between the defendant and *Jacobus Schoonmaker*; it was made of lopped trees; and, in some places, had stakes and riders. He did not know that the fence, forming *John's* western boundary, extended south to the *Mill Creek*; but he knew well, that the fence between *Joakim* and *John* extended to the *Mill Creek*; all the fences appeared to be of some years' standing. There was a road through the defendant's possession, which crossed the *Mill Creek*, and the low land adjoining the *Stoney Kill* was cleared when he first knew it.

John Depuy, aged 68 years, testified, that he lived near the family of the *Schoonmakers*; that Captain *Joakim* had seven sons; that he has known the lands south of the *Stoney Creek* from his earliest remembrance; that the low lands, in possession of three of those sons, appeared to be ancient clearings when he first knew them; that he knew the defendant's possession when a boy; it was then in possession of Captain *Joakim's* son *John*, who died there, before the war, and was succeeded by his son, who was succeeded by the defendant; that the *outside fences of the farm stand now where they stood when *John* settled there; he was present when the proprietors of the *Grote Transport* tract divided it; that the defendant's farm has been in fence, as it now is, as long as he could remember; that the low lands have been improved as long as any in *Rochester*; the descendants of Captain *Joakim* claimed the north and south sides of the *Stoney Kill*, as their own; that the cleared lands were along the *Stoney Creek*, which is low land; the low lands were in fence in 1768, when the *Grote Transport* tract random line was run; that 50 years ago, he followed the outside fence of *John Schoonmaker's* farm to the *Mill Creek*, and it was made of trees cut down, with cross stakes and riders; and high enough to keep out cattle; that the upland possession of the defendant was cleared a great many years ago; that the inhabitants of *Rochester* cut wood and made mill-stones where they pleased, on the unimproved lands, not in fence, and between *Stoney* and *Mill Creeks*; the low lands of *John Schoonmaker* were 8 or 10 acres, along the *Mill Creek*; and this possession he saw before *Josephat Du-bois* died. He heard from the defendant's father, that the 80

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and 100 acre deeds covered the low lands of the family, south of the *Stoney Kill*; the fence of *John Schoonmaker* ran from the *Stoney* to the *Mill Creek*; he saw, when young, a brush fence, running part of the way down the *Mill Creek*; it had stakes and riders, and he saw it before the division of the *Grote Transport* tract. All the fences are now as when he saw them.

Ephraim Baker, aged 62 years, testified, that he lived with old *Jacobus Schoonmaker*, when a boy; that he then, or about that time, saw a fence, running from the low land to the *Mill Creek*; and that there is a fence there now: old *Jacobus Schoonmaker* went for rails, south of the *Mill Creek*; the low lands were cleared when the witness first knew them, the *Schoonmakers* used to cart rails from south of the *Stoney Kill*, when he was a boy; the low lands of *John*, son of *Jacobus*, were all in fence, and staked and ridered. His present memory did not enable him to say, that the fence went farther south than the low land.

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Jacobus Wynkoop, aged 71, and *Elias Miller*, aged 62 years, testified to the same effect. *Miller* said he saw, when young, a fence, which extended to the *Mill Creek*, and crossed it, and ran down the same some distance; it was on the land then occupied by *John Schoonmaker*; this fence joined the fence said to belong to *Joakim*; beyond these fences it was all commons. The low land was cleared, when he first saw it, and he was brought up within a mile and a half of it. He knew the division between *John* and *Joakim*, but does not know that it extended to the *Mill Creek*; the fences remained in the same places, until he moved away, in 1773. *John* used the land as his own; the upland was then all wood; the low lands only were cleared. It was an old clearing when he first saw it; the fences were sufficient to keep out cattle; and there were bars which opened through them.

The defendant then produced a deed, from the children of Captain *Joakim* to *John Schoonmaker*, dated 20th March, 1745.

Frederick Westbrook, aged 54, a witness for the plaintiff, testified, that 40 years ago, no upland was cleared, and there was no fence on the *Mill Creek*; that 30 years ago he saw on the *Mill Creek*, a fence of lopped trees only, which appeared to have been recently made, and this possession fence ran up and down the *Creek*, for a short distance: *Lodowick Schoonmaker* told him, when he lived on the premises, 30 years ago, that he did not claim as far as the *Mill Creek*, but confined his claim to the fence running east and west.

**Abraham T. E. De Witt* testified, that in 1793 he saw no fence on the *Mill Creek*, and only the rail fence, running east and west, not far south of the defendant's house.

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John Miller, aged 64, another witness for the plaintiff, testified, that as to the existence of any fence, except that on the low land, that he had known the premises from a boy, and that there was no clearing on the low land, except five or six acres, at the old saw mill.

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The defendant then read in evidence, the *patent of Rochester*, dated 25th June, 1703, and the records of *Rochester*, to prove that the grantors to *Leonard Cole* were not trustees, at the time of the deed.

The judge charged the jury, that the title of the plaintiff was valid, and that he was entitled to recover, unless the defendant had made out an *adverse possession*, commencing in the life-time of *Josephat Dubois*, and continued down uninterruptedly; that the deed to *John Schoonmaker* was not located, and so could not aid the defendant; that there was not evidence of a continued possession, or of a sufficient fence; that only the possession of the low land along the *Stoney Creek* appeared to be adverse; and he thought the plaintiff ought to recover the land possessed by the defendant, to the foot of the ridge, along the low land.

The jury found a verdict for the plaintiff accordingly.

A motion was made to set aside the verdict, and for a new trial.

L. Elmendorf, for the defendant. The lessors have not shown sufficient title to enable them to recover against the defendant. They proved a conveyance from the trustees of *Rochester* to *Leonard Cole*, senior; *Leonard Cole*, the younger, conveyed to *Josephat Dubois*; but there is no evidence of any possession in *Dubois*, or those from whom he claimed title. No acts of ownership appear to have been exercised by either of them. On the other hand, the defendant has *shown an adverse possession as far back as the memory of the oldest witnesses can reach; a possession of above sixty years. Now, an adverse possession of 20 years is sufficient to give a good title.

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Again, there is sufficient evidence of a *descent cast*. *John*, the son of *Joakim Schoonmaker*, died in possession, and was succeeded by his son, who continued in possession; and after his death, was succeeded by the defendant.

The deed from the children of Captain *Joakim Schoonmaker*, in 1745, to *John Schoonmaker*, was sufficiently located to entitle the defendant to the benefit of a possession; and the judge was incorrect in directing the jury to disregard that deed.

The judge was also incorrect in his charge, in saying, that it was not enough merely to show a continued possession of 20 years, at a period of 40 years ago, but that an uninterrupted possession down to the present time should be shown, which would be a possession of 60 years. A continued adverse possession of 20 years gives a complete title; and there is no necessity for showing a continuation of the possession afterwards.

As the defendant held under color of title, the lopping of trees round woodland, connected with cultivated lands, is sufficient evidence of ownership, at least, 60 years ago; and no other evidence ought to be required.

J. Tallmadge and Sudam, contra. The lessors have shown a regular paper title from the patent of *Rochester*. [*E. Williams*, for the defendant. We admit the paper title.] Then, have the lessors lost that title, for want of a possession? The possession of *John Schoonmaker* must enure to the benefit of the lessors, who have the *title by deed; and unless the defendant makes out a clear adverse possession, the plaintiff must prevail. The lessors derive their title from government, which precludes the idea of a title in another. The possession will follow and support the title of the plaintiff, unless an actual *ouster* is shown.

The widow of *Josephat Dubois* took a life estate under the will, (6 *Cruise's Dig.* 193, 194, 319, 320, 181. *Com. Rep.* 233. *Cro. Jac.* 75. *Hob.* 32. *Cro. Eliz.* 15. 1 *Vern.* 22.) and after her death, as she remained a widow, the estate descended to the three daughters, named in the will.

But it is said, that there has been a disseisin and a descent cast, sufficient to toll the right of entry. A *disseisin* is an actual entry by wrong on him who has the freehold, and turning him out. There must be a tortious *ouster*, an actual expulsion, to constitute a *disseisin*, as distinguished from an intrusion or dispossession. (1 *Burr.* 107. 113. *Leon.* 209. *Bract.* c. 2. fol. 160. *Litt.* s. 279. 1 *Salk.* 246. *Cro. Jac.* 685. *Co. Litt.* 153. b. 257. b. 330. b. note. 285. 181. a. 266. b. note. 217. 1 *Cruise*, 15. s. 45, 46. 5 *Cruise*, 214.) There can be no disseisin by a person entering on vacant or uncultivated land; nor can there be a disseisin by a person who enters under color of claim or title. The words of the 4th section of the statute of limitations, (24 *sess.* c. 183. s. 4. 2 *Rev. Stat.* 292.) show that the disseisor must have no right or title to the lands of which he dies seised, in order to toll the right of entry.

No disseisin can affect the right of a person not having a right of entry, at the time of the descent cast. (7 *East*, 319. *Co. Litt.* 240. b.) During the life-time of the widow of the testator, the lessors had no right of entry. They cannot, therefore, be affected by any act, or *laches* of the tenant for life, or during the continuance of the particular estate.

Again, the lessors take the property as heirs at law, not as devisees; for where the same estate is devised to a person, which he would have taken by descent, he may take by descent. (2 *Saund.* 7. n. 4. 1 *Com. Rep.* 72. 123. 3 *Lev.* 127. 1 *Ld. Raym.* 728. 1 *Salk.* 241. 6 *Cruise*, 144. s. 2. 145. s. 6.) Here the lessors may elect to take either as heirs or devisees.

The statute of limitations would not run against the lessors, during the continuance of the life estate, and the *widow died in 1792; since that time the lessors have been *femes covert*, so that, since the death of *Josephat Dubois*, there has been no person who could bring an action of ejectment.

Though there may have been a possession adverse to the tenant for life, for more than 20 years, it will not bar those in

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remainder or reversion ; for the statute does not begin to run against the remainder-man or reversioner, until he has a right of entry. So that an estate may have been held adversely during a hundred years, and yet be recovered by a remainder-man. (*Sug. Law Ven.* 239, 240. 1 *Burr.* 60. 2 *Salk.* 422. 1 *Lutw.* 779.) The lessors do not derive their title through the particular estate ; their claim is wholly independent of the widow, and cannot be affected by any possession adverse to her. (2 *Evans's Pothier*, 228. 1 *Pothier*, 456.)

Again, to constitute such an adverse possession as will bar the real owner, it should not only be uninterrupted, but marked by definite boundaries. (1 *Johns. Rep.* 158.) There must be a real and substantial enclosure ; an actual occupancy, definite, positive and notorious. (2 *Johns. Rep.* 234.)

The possession set up by the defendant, prior to the death of *J. Dubois*, is certainly not of this character, and the lessors are not to be affected by any subsequent acts. A mere possession, without color of title, can never bar an adverse claim. (*Taylor's N. C. Rep.* 112.)

E. Williams, in reply. Whatever may have been the original right of the lessors, they have lost their remedy. *Joakim Schoonmaker*, the elder, was one of the original patentees ; and in the year 1729, made his will, devising all his estate, then, as we contend, in his possession, to his children, who, in 1745, executed deeds of release to each other, for their respective shares. This deed recites, that the seven sons of *Joakim Schoonmaker*, the elder, made a partition of the greatest part of the real estate devised to them, on the 6th April, 1731, and had each of them, since that time, severally held and occupied their *shares, according to such division. By that division, the premises in question, among other lots, fell to *John Schoonmaker*.

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The best evidence of a continued possession has been produced, that the nature of the case admits. Very aged witnesses prove a general reputation and tradition as to the possession of *Joakim* ; and an ancient deed refers to the same possession. The deed to *John* does, in fact, cover the premises in question ; but whether it does or not, is immaterial. It is enough that he entered and took possession under the deed ; thus entering under a color or claim of right.

The judge charged the jury, that the nature of the possession of *John* was such, that it must enure to the benefit of the real owner, or, in other words, that it was a mere possession fence. But this name given to the enclosure, by some of the witnesses, ought not to mislead the court, so as to destroy the right of the defendant. It was such a fence as had been invariably used in the country, for enclosing land for agricultural purposes. It was not made of mere lopped trees, but was

sufficient to keep out cattle. *John* cultivated the low land, built a house on the ridge, and enclosed the upland.

If there was an adverse possession in *Joakim*, and, afterwards, in *John*, antecedent to the year 1751, then *Cole* was incompetent to convey the premises to *Dubois*. But if there was not such an adverse possession against *Cole*, as to incapacitate him from conveying, still *Dubois* was dispossessed prior to 1751. If *Dubois* was out of possession, he could not devise in 1757; and then his children must take as heirs, and not as devisees. If they claim as heirs, what becomes of the particular estate in the wife, for life, on which so much of the argument of the plaintiff's counsel is founded? It is said, the lessors were *femes covert*; but if they took as heirs, they must take in 1757, and were bound to bring their action in twenty years thereafter. The husband and wife might bring their action. The saving of the statute is only for ten years after the disability is removed. The right of the husband and wife to bring the action is barred; and this is an ejectment on the demise of the husband and wife.

Again, if a disseisor, having been in the peaceable possession of land for five years, dies, a descent is cast, and tolls the right of entry, even of a *feme covert*. A *feme covert* may be disseised. (1 *Lev.* 166.) In the case of *Van Dyck v. Van Beuren* and *Vosburgh*, (1 *Caines's* 84. *S. C.* 1 *Johns. Rep.* 345.) the court decided that there might be a disseisin of vacant land; and that an exclusive perception of the rents and profits would work a disseisin, in spite of the true owner.

It is said, that as the title comes from government, it excludes the idea of a title in another; and the possession of the defendant, or those under whom he claims, must enure to the benefit of the true owner. But all grants of lands are derived from the government, and if this argument is to prevail, there would be no occasion for a statute of limitations. But that statute is founded on the presumption, that after twenty years, all evidence of the title is lost; and after a possession for that period, the court will presume a title in the possessor. A grant is presumed after thirty years.

KENT, Ch. J., delivered the opinion of the court. In this case, a regular paper title to the premises was shown to reside in those lessors of the plaintiff who are daughters of *Josephat Dubois*. He died in the year 1757, and by his will, an estate was given to his widow, for life, provided she remained his widow, (as she did,) and after her death, the remainder in fee to his daughters.

1. The first, and, indeed, the only material question of law arising upon the case is, whether the lessors are not barred by the statute of limitations. Assuming it as a fact, that *Dubois* was not disseised, and that no adverse possession existed against him, in his life-time, of the premises recovered, which

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are the uplands of *Stoney Kill*, it is then a settled position, that no subsequent disseisin or adverse possession, would bar the right of the lessors, if they brought their suit (as it appears they did) within twenty years after the death of the widow. Neither a descent cast, nor the statute of limitations will affect a right, if a particular estate existed at the time of the disseisin, or when the adverse possession began, because a right of entry in the remainder-man cannot exist, during the existence of the particular estate; and the *laches* of a tenant for life will not affect the party entitled. An entry to avoid the statute, must be an entry for the purpose of taking possession, and such an entry cannot be made during the existence of the life estate. (*Hunt v. Bourne*, 1 *Lutw.* 779. 781, 782. 2 *Salk.* 422. 1 *Burr.* 120. 126. 7 *East*, 311, 312. 319. 321.)

2. The second material point made in the cause is, as to a disseisin or adverse possession, existing at the time of the death of *Dubois*. On this point, the testimony is contradictory, and must be very uncertain, from the great length of time which has elapsed since the death of *Dubois*, which was 51 years before the time of the trial. Five witnesses on the part of the defendant testified to facts in favor of the existence of such adverse possession, though none of the facts tended to establish a disseisin, in the strictly technical sense of the term. Four witnesses on the part of the plaintiff testified to facts contradicting the existence of any such possession. Considering the remoteness of the period to which the witnesses referred, the loose and uncertain tenor and manner of their testimony, the ambiguous nature of the possession set up, the contradictory and nearly balanced testimony upon the subject, and that the cause was tried *by a struck jury, eight of whom had a view of the premises, there is no probability that any new light can be thrown upon the subject. The court would have been as well, if not better, satisfied, if the verdict had been the other way; but under the circumstances of the case, they do not think it would consist with the exercise of a sound discretion to disturb the verdict.

Motion denied.

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THIS was an action of debt on a bond, dated the 16th *June*, 1799, conditioned, that if, at any time from the date of the obligation, until the 16th *July*, 1809, the cellar wall, or two stacks of chimneys, in a house built by the defendant for the plaintiff, should settle; give way, or fall down from the place where they were then built, that then the defendant, his heirs, &c. should well and substantially rebuild the same, at his own expense, and pay the plaintiff all damages occasioned by their settling, giving way, or falling down, &c. The plaintiff, in his declaration, after setting forth the condition of the bond, averred, that the cellar wall and chimneys did, on the 1st *January*, 1800, settle, give way, and fall down, and that the defendant, though often requested, did not rebuild the same, nor pay the damages, &c.

*The defendant pleaded *non est factum*; and traversed the breach assigned, and the request to rebuild, or pay the damages.

The cause was tried at the *Rensselaer* circuit, in *October* last, before Mr. Justice *Yates*.

The plaintiff proved, that the chimneys settled and cracked, so that they took fire; that the defendant lived within thirty rods of the house; that the fire was a subject of public conversation in the neighborhood, and that the defendant was frequently at the house, after the fire.

A witness testified, that about a year before, Messrs. *Comstock* and *Walworth* called on the defendant to repair the wall and chimneys, and demanded payment for the damages.

The judge was of opinion, that to entitle the plaintiff to recover, it was requisite for him to prove a notice to the defendant of the situation of the wall and chimneys, and a request to repair them according to the condition of the bond.

The plaintiff then offered to prove that *Comstock* and *Walworth* had purchased the house of him in 1800, and that he assigned the bond of the defendant to them, by an endorsement thereon, under his hand and seal, and that notice thereof was given to the defendant; that a short time before the present action was commenced, the defendant went to the house and examined the situation of the wall and chimneys.

The judge decided that this evidence was inadmissible, and that a notice and request to the defendant from the plaintiff himself must be proved, before the plaintiff could recover.

The plaintiff was thereupon nonsuited.

A motion was made to set aside the nonsuit.

Where A. gave a bond to B. conditioned to rebuild the walls of a certain house, in case they gave way or fell down, in a certain time, and pay the damages; and the walls did give way within the time, and the obligee, having sold the house to C. assigned the bond to him, who gave notice to A. of the failure

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of the walls, and requested him to rebuild, &c., it was held that the notice from the assignee was sufficient. On a motion to set aside a nonsuit, the court do not take notice of objections to the sufficiency of the declaration; they properly arise on a motion in arrest of judgment.

Russel, for the plaintiff. No notice of the happening of an

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event is necessary to be given, where it is public *and notorious, and must be within the knowledge of the party. (*Com Plead. C. 73. 75. Cro. Jac. 102. 228, 229. 404. 432.*)

Where the obligor is in a situation to know the happening of the event on which he is to be liable, he is bound to take notice of it, and the obligee need not give him notice. In *Peel and others v. Tatlock*, (1 *Bos. and Pull.* 419.) where the defendant was bound for the fidelity of a clerk, it was held, that an action lay against the surety, for the embezzlement of the clerk, three years after the fact happened, and though no notice was given of the embezzlement to the obligor, until the action was brought by the obligee on the bond.

But admitting such notice to be requisite, before an action is commenced, we contend, that the assignees of the bond, in the present case, were competent to give the notice; for this court have decided, that they will take notice of the rights of an assignee of a *chose in action*; (3 *Johns. Rep.* 426.) and this case comes within the spirit of that decision.

Foot and Skinner, contra. It is admitted, that where the obligor must, from his situation, be supposed to know the fact, no notice is necessary; but this case does not come within that rule, for there is nothing in the defendant's situation, on which to ground, necessarily, a presumption of knowledge. Where a notice is essential, and necessary to be proved, the common words in a declaration, "though often requested," &c. are not sufficient; but a notice must be specially averred. As there was no averment of notice, none could be proved at the trial. The terms of the contract show the necessity of notice; for the obligor is to rebuild, and pay the damages, arising from a defect or failure of the wall or chimneys.

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*It is true, that the rights of assignees are to be protected. But here the right of action against the defendant, had accrued prior to the assignment, and when the plaintiff alone could give notice.

Per Curiam. Whether the declaration, in this cause, contains a sufficient averment of notice of a breach of the condition of the bond, or whether such an averment was at all necessary, are questions which cannot arise on the present motion. (a)

The defendant has seen fit to traverse such notice, and issue is thereupon taken; the question, which arose on the trial, related to the sufficiency of the proof to maintain such issue; and the only point now before the court is, whether it was competent for the assignees of the bond, to give notice of the breach, and request a performance of the condition. The assignees were the proper persons to give such notice; they alone were beneficially interested in the covenant. It was proved that the defendants had notice of the assignment. It

(a) *Sturgent v. —*, 5 *Conn. Rep.* 115, and the cases cited.

has been repeatedly decided, and well settled, both in our own, and in the *English* courts, that the right of an assignee of a *chose in action* will be recognized and protected. (3 *Johns. Rep.* 426.) (a) If notice of the breach in this case was necessary, the assignor might have refused to give such notice; and if the assignees could not, the covenant would, thereby, become nugatory. The defendant's counsel, upon the argument, seemed to admit, that the assignees were the proper persons to give notice, but contended that the proof was inadmissible, for want of a proper averment in the declaration. This objection, however, cannot prevail: the proof was in support of one of the issues in the cause: and whether the declaration contains a sufficient averment, is a question which must arise on a motion in arrest of judgment.

*We are, accordingly, of opinion, that the nonsuit must be set aside, with costs to abide the event of the suit.

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Rule granted.

(a) The rights of an assignee of a *chose in action* are now completely settled by the courts of law, who, though they preserve the form of an action in the name of the assignor, yet consider the beneficial interest as being entirely under the control of the assignee, whose rights cannot be defeated by the assignor. *Welch v. Mandeville*, 1 *Wheat. Rep.* 233. 5 *Wheat. Rep.* 277. *Gould v. Newman*, 6 *Mass. Rep.* 239. *Skinner v. Somes*, 14 *Mass. Rep.* 107. *Corser v. Craig*, 1 *Wash. C. C. Rep.* 424. *Littlefield v. Story*, 3 *Johns. Rep.* 421. *Raymond v. Squire*, 11 *Johns. Rep.* 47. Where an order is drawn for the whole of a particular fund, it is an equitable assignment of that fund to the payee, and, after notice, binds the fund in his hands. *Robbins v. Bacon*, 3 *Greenl.* 346. See *Clemson v. Davidson*, 5 *Binn. Rep.* 392. The right of the assignor of a *chose in action* is not defeated by the death of the assignor. *Cutts v. Perkins*, 12 *Mass. Rep.* 206.

OLCOTT against LILLY, who is impleaded with DOE.

KIRKLAND, for the defendant, moved for leave to enter an *exoneretur* on the bail-piece, on which the present suit was brought. The defendant, in his affidavit, stated, that, after the plaintiff had obtained a judgment against the principal, he sued

After the return of a *ca. sa.* against the principal, and the bail has become fixed, the court will not relieve

the bail, where the principal is dead. They afford relief only to enable the bail to make a surrender, or where the principal is convicted of felony, sent abroad as an alien, or is discharged under the bankrupt or insolvent laws, which is regarded as equivalent to a surrender. (a)

Where a plaintiff has obtained a judgment, he may first issue a *fi. fa.*, and if the whole of the debt is not levied on that execution, he may issue a *ca. sa.* or bring an action of debt on the judgment for the residue; and if a *non est inventus* is returned to such *ca. sa.*, he may proceed against the bail.

(a) See *Thomas v. Bulkley*, 5 *Cow. Rep.* 25.

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out a *fieri facias* against him, returnable in *November* term last, on which the property of the principal was taken and sold, and the proceeds thereof applied towards the satisfaction of the judgment; that at the return of the *fieri facias*, the principal was sick, and in so low a state of health, that he could not be surrendered, without endangering his life; and that he remained languishing of his disease until the 19th of *July* last, when he died. On the 21st *July*, the *capias* on the recognizance was sued out against the defendants, as bail, returnable at this term, and was served. The defendant also stated, that the principal had been, for four months, in a bad state of health, and unable to attend to any business, and that the *ca. sa.* against the principal was not issued until after the return of the *fieri facias*; that the principal was in the county of *Onondaga*, until his death, and might, at any time, have been taken on a *ca. sa.*

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From the affidavit read on the part of the plaintiff, it appeared, that the *ca. sa.* was issued on the 10th *February*, *returnable on the 17th *February* last, and had been four days in the hands of the sheriff, and was filed in the clerk's office on the 5th *May* last.

Kirkland contended, that the plaintiff, by electing to proceed, in the first instance, by a *fieri facias*, had discharged the bail. It was equivalent to a notice, that he intended to look to the principal, and not to the bail. (2 *Sellon*, 44. *Sheridan's K. B. Pr.* 368. 2 *Crompt.* 71. 3 *Burr.* 1360.)

The court, he said, will often interfere, and relieve the bail, where it becomes impossible to surrender the principal, as if he has been guilty of a felony and sent to the state prison. For a similar reason, in the present case, the bail ought to be relieved. He cited 2 *Johns. Rep.* 104. 6 *Term Rep.* 247. 2 *Sellon*, 57. *Coleman's Cases*, 65. 109. 1 *Caines*, 9.

Gold, contra, insisted, that the court had, in no instance, relieved bail, on account of the death of the principal. The indulgence, sometimes granted under special circumstances, was merely to enable the bail to surrender the principal, after the usual time had elapsed; but this could never be done, where the principal was dead. He cited 2 *Sellon*, 55. 6 *Term Rep.* 284. 4 *East*, 102.

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KENT, Ch. J., delivered the opinion of the court. 1. There is no case in which the death of the principal, after the return and filing of the *ca. sa.* has been allowed as a ground for relief. All the cases agree, that after the bail are fixed, *de jure*, they take the risk of the death of the principal. The attempt for relief has frequently been made, and as often denied. The time which is allowed the bail, *ex gratia*, is at their peril, and they must surrender. (1 *Roll. Abr.* 336. C. 1. *12 *Mod.* 601. *Freem. Rep.* 338. 1 *Str.* 511. 2 *Ld. Raym.* 1452. 2 *Str.* 717. 334

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2 *Wils.* 67. 6 *Term Rep.* 284.) There are cases in which the bail have been relieved, on motion, where the principal had become a peer, (*Doug.* 45.) (a) or been sent abroad, under the alien act, (6 *Term Rep.* 246.) (b) or had obtained a certificate as a bankrupt; (2 *Bos. & Pul.* 45.) (c) but in none of these cases, except in the last, does it appear that the bail had become fixed, when the event happened upon which they were relieved. A number of cases, in this court, have gone so far as to relieve the bail, if the principal had been discharged under the insolvent act, any time before the period allowed to the bail, *ex gratia*, had expired; but these decisions went upon the principle, that the discharge was equivalent to a surrender, and that it would be an unnecessary circuitry to have a formal surrender made, since the principal would immediately be entitled to a discharge; and the latest decisions in *England* seem to have gone the same length. (*Riddeler v. Mitchell*, April term, 1800. (d) *Ingraham ads. Kane*, October term, 1801. (e) *Van Alstyne ads. Brinkerhoff*, July term, 1802. *Seaman v. Drake*, 1 *Caines*, 9. 1 *Burr*, 244. 1 *Tidd*, 240.) (f)

To allow the motion, then, upon this ground, would be to change a long-settled and uniform course of practice and precedents. All that was said by the court, in the case of *Brownell v. Forbes*, (2 *Johns. Rep.* 101.) went no further than to admit that the bail were then entitled, under what might be called the equity side of the court, in respect to this subject, to

(a) It was conceded by the counsel for the plaintiff, in *Coze v. M'Clenachan* (3 *Dall. Rep.* 478.) that the privilege of Congress extended to arrests on judicial as well as mesne process; though he controverted the doctrine, that a person, arrested before he had privilege, was entitled to be discharged in consequence of privilege afterwards acquired, which was the case in that particular instance.

(b) Where the defendant was in the criminal custody of the *King's Bench* for a conspiracy, the Common Pleas would not take him out of such custody, in order to surrender him in discharge of his bail; but they enlarged the time for surrender, and in the mean time stayed the proceedings against the bail. *Bennett v. Kinnear*, 3 *Moo. Rep.* 259.

(c) The proper application, where the principal has become bankrupt, and obtained his certificate, (1 *Ken. Ca.* 504.) or been discharged as an insolvent debtor, (2 *Chitt. Rep.* 105.) is by motion for an *exoneretur*, as the bail cannot plead these matters in their own discharge. 1 *Bos. & Pull.* 448.

(d) Reported 1 *Caines's Rep.* 11. n.

e) Reported 2 *Johns. Ca.* 403.

(f) An insolvent discharge of a sister state, exempting only the person from imprisonment, and leaving the future acquisitions of the insolvent liable to execution, affects only the remedy of the party, and not the contract, and is not regarded in the state of *New-York*, and will not entitle the insolvent's bail to an *exoneretur*. *Whittemore v. Adams*, 2 *Cow. Rep.* 626. An *exoneretur*, when allowed, is allowed on motion, and on payment of costs, to avoid the unnecessary circuitry of a formal surrender, from which the principal would be entitled to an immediate discharge; but if the principal have time to plead his discharge, and omit to do so, an *exoneretur* will not be ordered, after judgment in favor of the bail, who will be left to surrender in the ordinary way. *Campbell v. Palmer*, 6 *Cow. Rep.* 596.

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be relieved on surrendering their principal, within the eight days after the return of the *capias* in debt on the recognizance. There is no decision of this court which has ever altered or shaken the *English* practice on the point before us.

2. The next ground of the motion for relief is, that the plaintiff had previously sued out a *fi. fa.* and *levied part of the debt, and that he afterwards resorted to a *ca. sa.* and to the bail, for the remainder. But it is not to be doubted but that the plaintiff may resort to these two kinds of execution, in succession; and that, after levying part by *fi. fa.*, he may sue out a *ca. sa.*, or bring an action of debt on the judgment, for the residue. (4 *Bos. & Pull.* 134.)

This is for the advantage of the bail. It lessens the demand for which they may be responsible; and it does not deprive them, in the mean time, of the right of surrender. There is no reason for saying that the bail are discharged, if the plaintiff elects to sue out a *fi. fa.* in the first instance; no such plea is to be found, and it is repugnant to the condition of their recognizance.

In *Heath v. Manucaptors of Hall*, (*Freem. Rep.* 344. pl. 425.) it was admitted, that though part of the debt be levied on the principal, yet the bail are liable for the remainder. The motion must be denied.

Motion denied.

ALBANY,
August, 1809.BRUCE
v.
LEE.BRUCE *against* LEE and MULLIKIN.

THIS was an *action of debt*, on a bond. The declaration was in the usual form. The defendant pleaded, 1. *non est factum*; and in his 2d plea, craved *oyer* of the condition, which was as follows, "that if the above bound *William Lee* and *Joseph Mullikin*, jointly, or either of them, their heirs, &c. shall, within fifteen days from the day that *James Elliot*, of the city of *New-York*, may or shall receive a discharge, by virtue of any act of insolvency, agreeable to the statute of this state, deliver to the said *Charles Bruce*, or to his heirs or assigns, *James Elliot's* notes, with approved endorsers, for the sum of 1,231 dollars and 36 cents, one third thereof in two months from the expiration of the said fifteen days, one third in four months, and the other third in six months, from the time aforesaid; then the above obligation to be void," &c.

They then pleaded, that they ought not to be charged, &c., because they say, that before the date of the said bond, to wit, on the 17th *March*, 1808, the said *James Elliot*, being an insolvent debtor, within the true intent and meaning of the act of the legislature, &c., did, in conjunction with certain of his creditors, present a petition, setting forth, &c., to the recorder of the city of *New-York*, who thereupon made an order, directing notice to be given in the gazette, for the creditors of the said *Elliot*, to show cause, before him, on the 11th *May*, 1808, why an assignment of the said insolvent's estate should not be made, and he be discharged according to the act, &c. On the day appointed, the plaintiff, as one of the creditors, appeared before the recorder, and showed cause against the assignment and discharge of *Elliot*, and the plaintiff and insolvent agreed that the bond in question should be given to the plaintiff, and that he, in consideration thereof, should withdraw his opposition to the assignment and discharge of the insolvent, and that the said bond was given in pursuance of such agreement, and for the consideration aforesaid; and so the said bond is void, &c., wherefore, &c.

*The *third* plea was to the same effect: there was a general demurrer to the second and third pleas, and joinder.

D. B. Ogden and *Gardinier* argued in support of the demurrer.

Wells and *Talbot*, contra.

Per Curiam. This cause comes before the court, on a general demurrer to the second and third pleas. The action is in debt on a bond, the condition of which is, that the defendant

Where A., an insolvent debtor, petitioned for

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his discharge under the insolvent act, and on the day appointed for the creditors to show cause why an assignment should not be made, and the insolvent discharged, &c., B., one of the creditors, appeared, and showed cause against the discharge; and it was then agreed between A. and B. that if the latter would withdraw all opposition to the discharge, &c. C. and D. should execute a bond to him conditioned to deliver to him A.'s notes, with approved endorsements, in 15 days after A.'s discharge, payable in instalments, which bond was accordingly executed by C. and D. and delivered to B., who, afterwards, brought an action on the bond against C.

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and D. And it was held, that the bond was illegal and void, as against the policy and intent of the insolvent act. (a)

(a) *Tuxbury v. Miller*, 19 Johns. Rep. 311

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v.
LEE.

should, within fifteen days after the discharge of *James Elliot*, under the insolvent act, procure and deliver to the plaintiff, the said *James Elliot's* note, with approved endorsers, for the sum of 1,231 dollars, and 36 cents. The pleas allege, that *Elliot* was proceeding to obtain the benefit of the insolvent act, and that, on the day appointed for the hearing of the creditors, in opposition, the plaintiff, being a creditor, appeared and showed cause against the discharge; and that, afterwards, and before *Elliot* was discharged, the defendant gave the bond in question, the consideration for which was, that the plaintiff should withdraw his opposition to *Elliot's* discharge.

The demurrer is not well taken. The consideration for the bond was illegal, and against the true intent and policy of the insolvent act. It is fairly to be intended, that the opposition made by the plaintiff would have been successful, and of course, that *Elliot* was not entitled to his discharge, either on account of fraud, or some other cause equally fatal. It was, therefore, a fraud upon the creditors, in aiding the discharge of a person not entitled to it. The opposition of the plaintiff might have lulled them to sleep, knowing, or presuming probably, that this alone, if persevered in, would defeat the insolvent. This case falls precisely within *the decision of this court, in the case of *Waite v. Harper*, (2 *Johns. Rep.* 386.) The consideration for the promise there was that the plaintiff would not oppose the defendant's discharge, under the insolvent act. The court said that the consideration for the promise was illegal, and founded on fraud, being made for the purpose of stifling a due scrutiny into the claim of the defendant to a discharge under the insolvent act. The present action being founded on a specialty, does not vary the case; the seal does not preclude an inquiry into the consideration, if illegal and fraudulent. The principle adopted by the court, in *Waite v. Harper*, is recognized in all the cases cited by the plaintiff's counsel; and it is a principle which will not be found to have been questioned by any adjudication. The bond having been given by third persons, and not by the insolvent, cannot alter the character of the transaction, according to the principle adopted by the court, in the case of *Robson v. Calze*, (*Doug.* 228.)

We are, accordingly, of opinion that the defendants are entitled to judgment.

Judgment for the defendants. (a)

(a) Promissory notes (*Baker v. Malack*, 1 *Ashm. Rep.* 57.) and other securities given to a creditor, to induce him to withdraw his opposition, have always been deemed contrary to the policy of the law, and void. *Rogers v. Kingston*, 2 *Bingh. Rep.* 441. *Constantine v. Blache*, 1 *Cox's Cases*, 287. *Jackson v. Davison*, 4 *Barn. & Ald.* 691. *Tuzbury v. Miller*, 19 *Johns. Rep.* 311. *Jackman v. Mitchell*, 13 *Ves. jun.* 581. *Wells v. Gerling*, 5 *Moo. Rep.* 78. *Wiggin v. Bush*, 12 *Johns. Rep.* 306. If, however, a man be really solvent, but puts on the appearance of insolvency so as to alarm his creditors, and thereby induces them to abate or release their demands, equity will relieve them. *Monger v. Kell*, 12 *Mod. Rep.* 558. 2 *Eq. Ca. Ab.* 479. 594.

ALBANY,
August, 1806.BURGER
v.
KORTRIGHT.*BURGER *against* KORTRIGHT.ON *certiorari*, from a justice's court.

Burger brought an action of trespass, before a justice of the peace, against *Kortright*, for damage done by his cattle on the land of *Burger*, by reason of *Kortright's* not having made his share or part of the partition fence, between the parties, and also for the expense of making the fence, which *Kortright*, though requested, had refused to make.

The defendant pleaded *not guilty*, and gave notice that he should offer evidence of damages, sustained by cattle, in consequence of the plaintiff's not having made his proportion of the division fence. Issue was joined thereon, and the cause tried by a jury, who found a verdict for the defendant, for 25 cents, with 6 cents costs. The defendant remitted the 25 cents, and the justice entered the *remittitur*, and gave judgment generally for the defendant.

Sudam, for the plaintiff in error. He cited 1 *Wils.* 30. *Yelv.* 43. 2 *Str.* 1110. 1171. *Laws of N. Y.* 24 sess. c. 78. s. 14.

Tappan, contra, cited 2 *Caines*, 179. 2 *Johns. Rep.* 84. 181. 3 *Johns. Rep.* 433. 427.

SPENCER, J., delivered the opinion of the court. Two objections have been made to the judgment below. The first is, that the defendant below could not remit the damages found; and that, by the 12th section of the act for the more speedy recovery of debts to the value *of 25 dollars, the justice is bound to give judgment on the verdict. (a)

This court have disregarded a verdict for 6 cents, considering it as merely nominal. If a jury in this court should give the plaintiff more damages than he claims by his declaration, there would be no hesitation in allowing a *remittitur* of the surplus beyond the damages laid in the declaration. So if, in an action in which the defendant was not entitled to damages, the jury should give him damages, I see no reason why he should not be allowed to remit them. A *remittitur* would be permitted in both cases, on the principle, that the party in whose favor a sum is found, has the right immediately to cede it to the other party; and that the mistake of a jury,

Where the jury, in an action, before a justice, gave a verdict for the defendant for 25 cents damages, and the defendant remitted the damages; and the justice entered the *remittitur*, and gave judgment generally for the defendant, it was held to be correct. How far the decision of fenceviewers is conclusive, *quære*. It is enough if any dispute exists about a partition fence, to enable the fenceviewers to interpose.

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(a) See 2 *Rev. Stat.* 244. 246.

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which can be corrected by the act of the party in whose favor it is made, and which mistake is not imputable to him, shall work no prejudice. The cases cited do not apply to this question; nor are they opposed to these principles: the act ought to be construed in subserviency to these principles. It was obviously the intention of the legislature, to take away all right from the justice, to control or set aside the verdict of a jury: it would be an unnatural and violent construction, to say, that the legislature meant to oblige the justice to give judgment in favor of a party, *volens volens*.

The second objection, which relates to the merits, is, that the jury have disregarded an agreement relative to the partition fence, between the parties; and have founded their verdict on the decision of the fence viewers. I doubt much the legal efficacy of the agreement. It was not made between these parties. At all events, disputes did exist between them, as to the proportion of fence to be maintained by each; and thus the case came within the statute. (*Rev. Laws*, 332. s. 14.) (a) An exception has been made to the decision of the fence viewers; but *it is of no avail; they never intended, and could not oblige the plaintiff, to make a fence across the defendant's land.

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The judgment ought not, therefore, to be disturbed, on account of any contrariety in the evidence, as to the decision of the fence viewers, if there appears enough to support it. The court are of opinion, that the judgment must be affirmed.

Judgment affirmed.

(a) 1 *Rev. Stat.* 353.

LIVINGSTON *against* TREMPER.ALBANY,
August, 1809LIVINGSTON
v.
TREMPER.

THIS was an action of covenant. The declaration stated, that on the 25th July, 1792, one *Thomas Berry* executed a bond to the plaintiff, for 96*l.* conditioned to pay 48*l.* on the 1st November, 1798, with the interest yearly, to be calculated from the 1st November, 1791; that on the 3d December, 1807, the defendant executed a writing, under his hand and seal, by which he covenanted, and promised to and with the plaintiff, that the principal and interest of the bond given by *Berry*, should be paid to the plaintiff, in twelve months thereafter, &c., averring a breach, &c., with the common conclusion.

There was a general demurrer to the declaration, and joinder.

Sudam, in support of the demurrer, contended, that as this was a promise, on the face of it, to pay the debt of another, and without consideration, it was void by the statute of frauds. It being under the hand and seal of *the party, made no difference; for where the promise, on the face of it, is void by the statute, a seal cannot render it valid.

In *Low v. Peers*, (4 Burr. 2225. *Wilmot*, 364. S. C. 2 *Selwyn's N. P.* 485.) it was decided, that although from the deliberation and solemnity which accompanies the execution of a deed, the law presumes a consideration: yet, that this doctrine applies only where the deed is good on the face of it: for a consideration cannot be presumed to support a deed, which is void on the face of it.

This court have decided, that the consideration, as well as the promise, should be in writing. (*Sears v. Brink*, 3 Johns. Rep. 210. *Bailey and Bogert v. Freeman*, 4 Johns. Rep. 280.) If the statute requires that the consideration should be in writing, or expressed on the face of the agreement, it cannot be implied from the mere seal.

Hawkins, contra. The cases of *Sears v. Brink*, and *Bailey and Bogert v. Freeman*, were on simple contracts. It is evident from the reasoning of the court, in the case of *Jackson, ex dem. Hudson and others, v. Alexander*, (3 Johns. Rep. 484.) that the court did not intend to apply the doctrine to deeds, or sealed instruments, which, in themselves, import a consideration. This distinction between contracts by deed, and by parol, is well settled. The former are not within the statute of frauds. (*Roberts on Frauds*, 7. 10. 7 Term Rep. 350. 2 Bl. Com. 446. *Hardres*, 80. *Plowd.* 308.)

KENT, Ch. J. We do not wish to hear you on this point. It is too well settled to admit of doubt.

A covenant to pay the debt of another is not within the statute of frauds, which does not apply to writings under seal. A covenant, of itself, imports a consideration.

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VAN NESS, J. There is a fallacy in the argument of the defendant's counsel. The statute of frauds was never meant to alter the common law. Any promise, under *seal*, was valid at common law. The *seal* imports a consideration, as much as if it was expressed in so many words. The statute of frauds says merely, that a promise to pay the debt of another shall not be valid, *unless in writing. The statute has no application to a writing under seal.

Per Curiam. The promise to pay, in this case, was in writing and under *seal*, and is not, therefore, within the statute of frauds, nor any decision under it. The *covenant*, of itself, conclusively imports a consideration, so that it is not necessary that it should be set forth in the deed. The plaintiff is entitled to judgment, but the defendant has leave to withdraw his demurrer, on payment of costs.

Judgment for the plaintiff.

JACKSON, *ex dem.* HULL, against BABCOCK.

Where G., by writing under his hand and seal, gave to H. the privilege, during pleasure, to occupy a certain piece of land, and H. afterwards sold the land to C., it was held, that the instrument given by G. was a mere license or personal privilege to occupy, which was determined as soon as H.

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undertook to convey the premises.

THIS was an action of *ejectment*, brought to recover lands, which include the *Mineral Spring*, in the village of *New-Lebanon*, in the county of *Columbia*, in the possession of the defendant. The cause was tried at the *Columbia* circuit, in *October*, 1808. On the trial it was admitted by both parties, as follows: That prior to the year 1760, and from that time down to the 19th *December*, 1778, *Charles Goodrich* held the premises, claiming in his own right; that on the 19th *December*, 1778, *James Hitchcock*, an invalid, and a poor man, came to the *Springs* for the purpose of using the water; on application to *Goodrich*, he obtained from him the following instrument in writing, to wit: "Taking into consideration the advantage the pool may prove to the public good of mankind, and the convenience of more buildings on the premises, for their comfort, as well as out of benevolence *to Mr. *James Hitchcock*, whose circumstances and character render it necessary, and his own and the public advantage: wherefore I do give the privilege, and secure by this lease unto the said *James*, during his pleasure, unmolested, the privilege of building over, or near the said pool, on the sequestered lands, on that land reserved adjacent to the said pool, which is reserved for the advantage the public may have of the said pool, in *Hancock*: and that the said *James* shall have the privilege of building as aforesaid, thereon, free from molestation, disturbance, injury, or removal,

from, or under me, for him the said *James* to inhabit, occupy, peaceably, and quietly possess the premises aforesaid, during his necessity or pleasure. Provided, nevertheless, the said *James* shall not thereby molest, or discommode the public good, or encroach, or impede the public privileges, contrary to the design hereof.

"*Pittsfield*, 19th December, 1778.

CHARLES GOODRICH," L. S.

Hitchcock, some time after, built a small house, near the pool, and took possession of a small piece of land, for a garden; continuing an invalid, he lived in possession of the house, under *Goodrich*, and his assigns, to the 25th July, 1795, when *Hitchcock* executed to *Andrew Cragie*, a conveyance, without covenants, or warranty, of all his right to the house and land, so possessed by him, lying around the pool, being the premises in question; and on the same day delivered to *Cragie* the possession according to, and under the same conveyance. The defendant then hired the same premises of *Cragie*, and has continued to hold them of *Cragie*, to this time, and has erected additional buildings thereon.

*On the 18th January, 1790, *Goodrich*, in due form of law, conveyed the same premises to *William Nichols*, without reserving any right in the premises, either to himself, *Hitchcock*, or any other person.

By mesne conveyances, the lessor of the plaintiff became possessed of all the right and title to the premises which were ever vested in *Goodrich* or *Nichols*.

Notice to quit had been repeatedly given; but the defendant and his landlord always denied the title of the lessor of the plaintiff, claiming title in himself, by virtue of the deed from *Hitchcock*, who is still living, and now resides with the lessor of the plaintiff.

A verdict was entered for the plaintiff, by consent; subject to the opinion of the court, upon the foregoing case.

E. Williams, for the plaintiff, was stopped by the court.

Van Vechten, contra.

Per Curiam. The instrument of writing, given by *Goodrich* to *Hitchcock*, was a mere license, or personal privilege to inhabit; it conveyed no title to the premises. As soon as *Hitchcock* sold the premises to *Cragie*, it put an end to the privilege granted by *Goodrich*. The plaintiff is clearly entitled to recover.

Judgment for the plaintiff.

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ALBANY,
August, 1809.

HOLDEN
v.
DAKIN.

*HOLDEN *against* DAKIN.

IN ERROR on *certiorari*, from a justice's court.

A. sold to B. paints for good *Spanish brown* and *white lead*, and for a full price; the paints proved to be bad, and of no value. It was held, that there was no warranty in this case; and to make A. liable, there must be either an express warranty or fraud. (a)

Dakin sued *Holden*, before a justice, and declared that he, *Dakin*, purchased two kegs of paint, for *Spanish brown*, of 56 pounds each, at 9d. per pound, and two kegs of *white lead*, of 28 pounds each, at 1s. 7d. per pound, which paints were adulterated, and of an inferior quality, and in fact were not *Spanish brown* or *white lead*, nor good for any thing. The defendant pleaded not guilty.

Upon the trial, the defendant acknowledged the sale of the paints. The plaintiff proved that the *Spanish brown* so bought, was of a very inferior quality, and much adulterated, and that the *white lead* was also much adulterated, though not so bad as the other. He bought the paints of a clerk of the defendant, at his store, who sold them for good paints, but the kegs had never been opened, since they were purchased at *New-York*, by the defendant.

The justice gave judgment for the plaintiff, on the ground that the *Spanish brown* was of little or no value; and that the selling it for good paint, and for the usual cash price of the best *Spanish brown*, was a sufficient warranty.

Per Curiam. Here was no express warranty, as to the quality of the paints. All that was proved upon the trial was, that the clerk of the vendor sold the paints for good paints, and at a fair price; but this was not sufficient to raise a warranty. This point has been frequently determined. (2 *Caines*, 48. 1 *Johns. Rep.* 96. 129. 274.) If a warranty was to be inferred from these *circumstances, then, as the court observed, in *Snell v. Moses*, (1 *Johns. Rep.* 96.) a warranty would be universal, upon every *bona fide* sale, at the usual price, unless there was a stipulation to the contrary. There was no pretence in this case, that the vendor *knew* that the paints were of an inferior quality.

Judgment reversed.

(a) *Sweet v. Colgate*, 20 *Johns. Rep.* 196, and the cases there cited. See *Thompson v. Ashton*, 14 *Johns. Rep.* 316.

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August, 1893.SIMPSON
v.
PATTEN.SIMPSON *against* PATTEN.IN ERROR on *certiorari*, from a justice's court.

Patten, the defendant in error, sued *Simpson*, the plaintiff in error, in the court below, on a promise, that if he, *Patten*, would forbear to sue one *J. S.*, the present plaintiff in error would pay the defendant in error the amount of the note of *J. S.* to the defendant in error, which was then due, as soon as he could sell an acre of land, belonging to the said *J. S.*, which he was authorized to sell; and the plaintiff averred that *Simpson* did sell the acre of land, for the sum of 50 dollars, &c.

A promise to pay the debt of a third person, though made on a sufficient consideration, must be in writing.

The defendant in error offered to prove the promise, as stated; but the plaintiff in error insisted that there ought to be some note, or memorandum in writing of the promise, otherwise the plaintiff could not recover; but the justice admitted evidence of the verbal promise, and gave judgment for the plaintiff.

Shepherd, for the plaintiff in error.

Van Vechten, contra, cited *Elting v. Vanderlyn*, (*ante*, p. 237.)

**Per Curiam*. A promise to pay the debt of a third person must be in writing, (a) notwithstanding it is made on a sufficient consideration. (2 *Str.* 873. 2 *Term Rep.* 80. 2 *Wils.* 94. 1 *Saund.* 211. n. 2.) The judgment below must be reversed.

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Judgment reversed.

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The PEOPLE
v.
PARKER.

NICHOLS against HEWIT.

IN ERROR on *certiorari*, from a justice's court.

A confession of judgment must be for a certain and specific sum. (a) A judgment entered by a justice on the confession of a party, for such sum as A. and B. should award, before the award is declared, is bad.

After the parties had appeared in the suit below, and were ready to proceed to trial, they agreed to submit the cause to the arbitrament of the justice and another person; and that their award should be final and conclusive, and that the justice should enter a judgment for the sum awarded.

After the arbitrators had agreed on the balance due to *Hewit*, of 11 cents, but before the same was made known, the justice asked the parties, whether a judgment should be entered, agreeably to the award, to which they agreed, and the justice thereupon entered a judgment for the sum of 11 cents, in favor of *Hewit*, and for the costs.

Shepherd, for the plaintiff in error.

Crary, contra.

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Per Curiam. The defendant below confessed judgment for the amount of an award, before it was published; and then the justice declared it to be in favor of the *defendant in error, for 11 cents, and entered judgment accordingly. A confession of judgment ought to be for a certain and specified sum. The justice had no power to enter judgment, on a *cognovit* for an uncertain and unliquidated amount. The judgment must be reversed.

Judgment reversed.

(a) See *Livingston v. M'Inlay*, 16 Johns. Rep. 165.

The PEOPLE against PARKER.

The breaking open in the night time of a store, at the distance of 20 feet from a dwelling-house, but not connected with it, by any fence or enclosure, is not burglary.

THE defendant was convicted, at the last *Oyer and Terminer*, in the county of *Washington*, of a *burglary*. Judgment was respited, in order to take the opinion of this court, whether the case amounted to burglary.

The facts were these: The prisoner broke open a store, belonging to *Halsey Rogers*, in the night time. The store was at the distance of twenty feet from the dwelling-house of *Rogers*, and no person slept in the store. The house and store both stood on the same lot, and on the same line, fronting on the public highway. There was no fence between the house and store, nor any enclosure around them, but both of them,

and the lot of ground on which they stood, were open to the street.

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Per Curiam. The store was not within the *curtelage*, as there was no fence or yard, enclosing the dwelling-house and store, so as to bring them within one enclosure. This brings the case within that of the *King v. Garland*, (*Leach*, 130.) and distinguishes it from *Gibson's case*, (*Leach*, 287.) The prisoner must be discharged.

Prisoner discharged.

*SHUMWAY against FOWLER.

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THIS was an action of *trespass* on the case for debauching the plaintiff's daughter. The cause was tried at the *Washington* circuit, and a verdict found for the plaintiff, for 1,025 dollars. The plaintiff's daughter was a witness on the part of the plaintiff, at the trial.

A new trial will not be granted, on the discovery of new evidence which would merely impeach the character of a witness at the trial, nor where the affidavit states only, that a person had told the party what he would say. (a)

Z. R. Shepherd, for the defendant, now moved to set aside the verdict, and for a new trial, on the ground of newly-discovered evidence. He read affidavits stating that, since the trial, the defendant had discovered a material witness, one *A. B.*, who told the defendant's attorney, that, before the connection between the defendant and the plaintiff's daughter, he, the said *A. B.*, had criminal connection with her, and also informed him, that another young man had told him, that he had previously had connection with the plaintiff's daughter; and that the defendant also expected to prove the same thing to have taken place between her and another person.

Foot, for the plaintiff.

Shepherd, contra.

Per Curiam. A new trial is not to be granted, merely on the discovery of new evidence, which would impeach the character of a witness at the trial. There would be no end of new trials on that ground. (2 *Salk.* 653. 12 *Mod.* 584. *Sayer*, 27. 3 *Johns. Rep.* 255.) (b) The newly discovered evi-

(a) *Sargent v. —*, 5 *Cow. Rep.* 123.

(b) It is incumbent on the party who applies for a new trial, on the ground of newly-discovered evidence, to satisfy the court, 1st. that the evidence has

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dence is to impeach the character of the daughter, who was a witness at the trial. There is another objection to the affidavit in this case. It states merely, that the persons mentioned, had told the party what they could say. There can be no reliance on such *declarations; nor could the persons, at the trial, be obliged to answer whether they ever had such criminal connection with the daughter. The motion must be denied.

Rule refused.

come to his knowledge since the trial; 2d. that it was not owing to want of due diligence, that it did not come sooner; and, 3d. that it would probably produce a different verdict, if a new trial were granted. *Moore v. The Philadelphia Bank*, 5 Serg. & Rawle, 41. See *Stockbridge v. Stockbridge*, 13 Mass. Rep. 302. *Bond v. Cutler*, 7 Mass. Rep. 296. *Knox v. Work*, *Stuber v. Ealer*, 2 Binn. Rep. 582. *Turnbull v. O'Hara*, 4 Yeates's Rep. 446. So a new trial will be granted, if a party be surprised by an allegation of payment sworn to by witnesses, who, there was reason to suppose, had been tampered with, or practised upon. *Peterson v. Barry*, 4 Binn. Rep. 481. But it will not be granted for the purpose of giving a party an opportunity of discrediting a witness produced against him, if it appear that he was not surprised by the testimony of the witness at the trial. *Keene v. Sprague*, *Haskell v. Beckett*, 3 Greenl. Rep. 77. 92. *Commonwealth v. Waite*, *Hammond v. Wadhams*, 5 Mass. Rep. 261. 353. See also *Deacon v. Allen*, 1 South. Rep. 338. *Sheppard v. Sheppard*, 5 Halst. 74. *Arthur v. Chavis*, 6 Rand. Rep. 142.

BUNN against RIKER

At common law, an action for a wager is maintainable; but a wager which is against the principles of sound policy, is void, and cannot be recovered. (a)

THIS cause came before the court on a writ of error, from the Common Pleas of the city of New-York.

Riker, the defendant in error, brought an action of *assumpsit*, against *Bunn*, the plaintiff in error, in the court below. The declaration contained three counts. The first count was on the following receipt, or memorandum, in writing:—

“New-York, 30th April, 1807.

‘Received of *Joseph Graham* and *Samuel Riker*, jun. 100 dollars each; which sums I promise to pay to Mr. *Graham*, in case *Morgan Lewis* shall be re-elected governor of this state, or to Mr. *Riker*, in case *Daniel D. Tompkins* shall be elected to the said office, at the said election.

“JOHN BUNN.”

The plaintiff averred, that the said *D. D. Tompkins* was

(a) *Burch v. Keeler*, 5 Wend. Rep. 250. *Burt v. Gott*, 9 Cow. Rep. 169. and see note at page 175.

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elected governor of this state, at the said election, by reason whereof, &c. the defendant became liable, &c. and being so liable, in consideration thereof, assumed to pay, &c. The second count was for money had and received to the use of the plaintiff. The third count was on an *insimul computasset*.

*At the trial of the cause, a *bill of exceptions* was tendered, which stated, that the plaintiff gave in evidence the receipt above-mentioned. A witness then proved, that after the general election for a governor was closed, he called on *Bunn* with the receipt, and demanded payment of the 200 dollars; who answered, that *Graham* had not yet paid him the sum, mentioned in the receipt; but that he would soon see *Graham*, and whether he obtained the money of him, or not, he would pay the sums mentioned in the receipt, to the defendant in error.

John Woodworth, the late attorney-general, who was also examined as a witness, testified, that he was one of the canvassers of the votes for the governor, given at the late election; and that the proceedings of the canvassers, and the result of the said election and canvass, were duly entered in a book, in the office of the secretary of state, in the manner prescribed by law; that, as appeared by the said canvass, *Daniel D. Tompkins* was elected governor of the state of *New-York*, at the last election; and that the returns of the votes given at the said election were destroyed.

The counsel for the plaintiff in error objected to this testimony, so far as related to the result of the election or canvass; but the same was, notwithstanding, admitted by the court below.

It appeared also, that both *Graham* and *Riker* were electors, qualified to vote for governor, and that *Riker* had voted on the day preceding the giving of the receipt by *Bunn*. *Graham* resided in the *middle* district, out of the *southern* district, in which the other party resided.

James Cheetham, who was a printer to the state, was also produced as a witness, and testified, that the certificate of the canvass of the last election was published in a certain newspaper, called the *Albany Register*, *printed at *Albany*; and that he was instructed, by a note from the canvassers, to copy this certificate from that paper, into his own paper, printed in the city of *New-York*, which he accordingly did. He produced one of his papers containing the same certificate, which declared that *Daniel D. Tompkins* had been elected governor of this state, at the said election.

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This testimony was also objected to by the counsel of the plaintiff in error, but admitted by the court below. The counsel for the plaintiff below then produced a commission to *John Parkes*, a notary public, under the great seal of the state of *New-York*, tested in the name of *Daniel D. Tompkins*, as governor, and signed by him; and also a *supersedeas* to the assistant justices of the peace, in the city of *New-York*, sealed,

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tested and signed in the same manner, both of them dated on the 1st July, 1807; these papers were objected to, but admitted by the court.

The counsel for the plaintiff below then insisted, that the said election was a matter of public notoriety, which the court and jury were bound to take notice of; this was denied and objected to by the counsel on the other side; but was allowed by the court to be sufficient evidence.

Hopkins, for the plaintiff in error. 1. The first and most important question, arising on the assignment of errors, in this cause, is whether the plaintiff can sustain an action for the wager; or whether this court will sit to decide on every idle bet between parties, which can have no relation to the administration of justice; above all, in a case of a wager between qualified electors, pending an election.

In the case of *Allen v. Hearne*, (1 Term Rep. 56.) the Court of K. B., in *England*, decided that a wager, between two voters, *with respect to the event of an election of a member for parliament, before the poll began, was illegal.

Wagers of this nature are against morality and sound policy; and if they have not been countenanced by the courts of *Great Britain*, there are stronger reasons for not allowing them in this country, where elections are more frequent and more free; and where every means ought, therefore, to be used, to maintain them pure. Such wagers operate as a bribe, and influence the party, by the strongest motives of pecuniary interest, not only to vote for the particular candidate, but to endeavor to influence others to vote for the same person; all freedom of choice, or of action, is destroyed. The evils of party spirit will be greatly increased, if, in actions on wagers, the question is to be investigated, and decided in this court, whether a person, declared by the canvassers to be elected, has been duly elected, or whether there is a governor *de jure*, or *de facto*; for although the certificate of the canvassers is conclusive as to the person who is to act as governor, it is only *prima facie* evidence, in an action of this kind, and the party may go into evidence, to show that the canvass was not correct, or was illegal. Canvassers may corruptly declare a person to have been elected as governor, who has not been, in truth, duly elected. Thus a wide field of litigation may be opened; a jury may find, that the governor elect, or *de facto*, has not been duly or legally elected, but that another person is the legal governor, by a majority of the votes of the electors; and great discontents may be created, and disturbances raised among the people. Indeed the evils which may arise from countenancing actions for such wagers, are too obvious to escape the attention of the court.

But I put the broad question, Will this court support actions for wagers of any description? (2 Mass. Rep. 5. *Amory v. Gil* 350

man.) I place out *of view, as standing on a totally different ground, those fictitious wagers, or feigned issues, devised for the more perfect administration of justice; where the object is not to recover any wager, but to ascertain the truth of facts, in controversy between the parties.

The *English* courts have, in some instances, allowed actions for wagers; yet several of their most enlightened judges have been of opinion, that it would have been better for the public, if the courts had originally determined, that no action, to enforce the payment of a wager, should be permitted; and that in no case ought it to be permitted, where it would be contrary to the principles of *morality* or sound policy. (*Cases temp. Hardw.* 239. *Cowp.* 729. 2 *Term Rep.* 615. 3 *Term Rep.* 697. 704. 2 *H. Bl.* 44.)

In *Atherfold v. Beard*, (2 *Term Rep.* 610. *Comb.* 425.) the court refused to support an action for an idle wager, which might draw into discussion a matter of *public* interest and importance; as a wager respecting the future amount of a branch of the public revenue. *Buller, J.*, considered Lord *Mansfield* as being of opinion, that any wager, as to a *public* event, would be void. And the same learned judge, in the case of *Good v. Elliott*, (3 *Term Rep.* 693. *Cowp.* 735.) though he admitted and regretted, that actions for wagers had been, in some cases, permitted, was of opinion, that no action could be maintained for a wager, concerning the *private transactions* or interests of a *third* person.

There does not appear to have been any decision in *England*, before the year 1776, that a mere idle bet, or wager, could be recovered in a court of law. This court are not, therefore, tied down by any authority; and it would be a matter of regret, if they were bound to follow precedent, in this case, against principle.

Again, this wager is illegal and void, under "the act to prevent horse-racing, and for other purposes." The 5th section of that act declares, "that all and every contract for or on account of any gaming, by lot or chance, of any kind, or under any description whatever, *shall be deemed and adjudged void in law." (1 *Rev. Stat.* 662.) A wager or bet is gaming. A bet, on the throw of a *gamester*, is as much gaming as to throw the die. Who is to be elected governor, is a matter of chance; it is gaming by lot or chance, or playing for money, that the statute is intended to prevent.

2. The first count in the declaration in this case is bad. It is on the paper, or memorandum, as a specialty, or as if it were a promissory note. A writing not sealed is a *parol* agreement. The writing may be evidence; but in a declaration you must aver the fact, not state the evidence. Again, there is no averment, that the money was ever deposited in the hands of the defendant. There is no ground or consideration for a promise, or liability on the part of the defendant.

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An action of *indebitatus assumpsit* will not lie for a wager, or money won at play. (3 *Salk.* 14. 1 *Ld. Raym.* 69. *Carth.* 338.)

3. The evidence given in the cause below, was inadmissible, and ought to have been rejected. Mr. *Woodworth*, one of the canvassers, testified, that the canvass, or result of the election, was in writing, and filed in the office of the secretary of state. There was, then, a higher species of evidence, which ought to have been produced. But the testimony of this witness is mere parol evidence of a matter of record. The same objection may be made to the paper printed by Mr. *Cheetham*, for it is not the highest evidence, to wit, the record of the canvass, in the secretary's office.

Again, the court below decided, that the result of the election was a matter of public notoriety, of which all the world was bound to take notice; but when, and how is this to be a matter of such public notoriety, as to be evidence to all the world? There may be a great division of public opinion, on this subject, between the two great political parties.

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**R. Riker*, contra. Whether an action for a wager can be maintained in any case, is a question not necessary now to be discussed, since such actions have been sanctioned by a series of decisions, in the *English* courts, from the reign of *Charles II.* to the present time. The case of *Andrews v. Hearne* (1 *Lev.* 33. S. C. 1 *Keb.* 56. 65.) was an action of *assumpsit* for a wager, whether *Charles II.* would be king of *England*, within twelve months. No objection was made against the action in that case. And *Jones v. Randall*, (*Cowp.* 37.) decided in the year 1774, was an action sustained in the Court of K. B. for a wager, whether a decree of the Court of Chancery would be reversed in the house of lords. Lord *Mansfield*, and the rest of the court, were clearly of opinion that such an action would lie, unless it was against good morals, or sound policy. In the case of the *Earl of March v. Pigot*, (5 *Burr.* 2802.) the parties bet on the lives of their respective fathers, yet no objection was made to the action. In the case of *Good v. Elliott, Grose, J.*, said, that actions for wagers had been innumerable, and that what Lord *Mansfield* said, in *Da Costa v. Jones*, (*Cowp.* 729.) was decisive, that wagers were not void, *quia* wagers; *Ashhurst, J.*, and Lord *Kenyon* were of the same opinion. The rule, as resulting from all the decisions, seems to be, that a wager is good, and recoverable, unless, by injuring a third person, it may disturb the peace of society, or militates against the morality or sound policy of the country.

In the case of *Allen v. Hearne*, (1 *Term Rep.* 56.) the bet was laid before the poll had opened. In the present case, *Riker* had voted, and *Graham* could not vote out of his district.

But even admitting the contract to be illegal, this illegality

cannot be set up by the defendant, who is a mere stake-holder or receiver of money to the use of the plaintiff. (1 *Bos. and Pull.* 3. 5 *Term Rep.* 405. 7 *Term Rep.* 535. 8 *Term Rep.* 575.)

2. The declaration states the facts as they existed. It sets forth the receipt. In a declaration on a policy of insurance, which is an unsealed instrument, it is the invariable practice to set forth the policy and aver the loss, and that, by reason thereof, the defendant became liable. So you may declare on a promissory note not negotiable under the statute.

3. The act for regulating elections (24 Sess. c. 61. s. 9. 11. First volume *Revised Statutes*, page 142.) makes it the duty of the secretary of state, in conjunction with the comptroller and treasurer, to ascertain the result of the election, after the transcripts of the poll-books are returned by the clerks of the several towns and counties. And they are directed, without delay, to make out a certificate of their determination, to be entered in a book in the secretary's office, and to cause it to be published in one or more of the public papers, printed in each of the great senatorial districts. The printer in the southern district, who was a witness in the court below, testified, that he published this certificate, by direction of the canvassers. This may be considered as an *Act of State*, of which the state gazette is sufficient evidence. In the case of the *King v. Holt*, (5 *Term Rep.* 436. *Peake's Law Ev.* 80, 81. 4 *Hawk. P. C.* 430.) it was decided, that the gazette was evidence of the king's proclamation, and of an address to the king, or of articles of war. On an indictment for adhering to the enemies of the king, public notoriety is sufficient evidence to a jury of the fact, whether there was war or not. (*Foster, Disc.* 1. c. 2. s. 12.) So on an indictment for the murder of a constable, or other public officer, proof that he was, *in fact*, such officer, is sufficient, without producing his commission.

In the Circuit Court of the *United States*, the *exequatur* of a *British* consul has been admitted, as evidence of the fact that he was consul.

Hopkins, in reply. The defendant, being a stake-holder, stands in the place of the parties; and may make the same defence as *Graham* himself could have done, had the plaintiff brought his action against him. Until the money is paid over, either party may bring an action against the stake-holder, to recover the money deposited; (5 *Term Rep.* 405.) and he is subject to the same obligations, and entitled to the same defences, as the parties themselves. (*Evans's Es.* 63.)

Public notoriety cannot be sufficient evidence of the person who is governor. There may be a *governor de facto*, and a *governor de jure*. The certificate of the canvassers is the proper and indispensable evidence of the person elected. The *exequatur* of a consul is the best evidence, because it is issued

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by the government; and is the instrument by which it acknowledges the person to be a consul.

VAN NESS, J. The counsel for the plaintiff in error, denies that, at common law, any wager is recoverable, wherein the parties have no other interest than that which they create by the wager itself. It is now too late to draw this point into discussion. The law appears to be settled, that some wagers form the proper ground of an action. (a) It is worthy of remark, however, that as often as this question has been raised, there is scarcely a judge in *England*, from the time of the case of *Da Costa v. Jones*, down to the present day, who has not expressed his regret that such was the law.

But that there is a class of wagers, to the recovery of which the law will not lend its aid, is conceded; and it, therefore, becomes necessary to inquire, whether the present wager belongs to that class.

It was held, in the case of *Jones v. Randall*, (*Cowp.* 37.) and *Da Costa v. Jones*, (*Cowp.* 729.) and in several of the more recent cases, cited on the argument, that wagers against the principles of sound policy are void. I consider this to be emphatically a wager of that description. It may involve an inquiry into the validity of the election of the present chief magistrate.

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*The counsel for the defendant in error insisted, that the certificate of the canvassers is made conclusive, by the statute, on this point. But is their certificate conclusive in every case? Suppose one of the canvassers should count the votes, and the rest certify the result? Or suppose it could be made to appear that their certificate was obtained by bribery, would it, notwithstanding, be conclusive? Whether the certificate, when made, pursuant to the act, is decisive as to the election; and whether a case may not occur, when it might be considered as a nullity, or as constituting the person in whose favor it is made, merely the governor, *de facto*, are points which it is not my intention even to discuss, much less to decide.

We all recollect, that on one occasion, different opinions were entertained and expressed with respect to them. They are

(a) In *Phillips v. Ives* (1 *Rawls*, 36), it was held, that no wager concerning any human being is recoverable in a court of justice; and that, therefore, a wager whether or not *Napoleon Bonaparte* would, within a specified time, be removed or escape from the island of *St. Helena*, was determined to be void. Two of the judges (Gibson, C. J., being one) dissented. It had been previously determined in two cases in the Common Pleas of *Philadelphia* county, that wagers were valid in *Pennsylvania*, unless they were immoral, or indecent, or illegal. *Morgan v. Richards*, 1 *Brown's Rep.* 171. *Smyth v. M'Masters*, 2 *Brown's Rep.* 182.

questions which perhaps no existing tribunal is competent to decide, should they unfortunately again arise. It is enough, that this wager may give birth to such a question, to pronounce it to be repugnant to the dictates of good policy. The discussion to which it gives rise, ought to be discouraged, unless the public good, or the due administration of justice, renders it unavoidable. It is a discussion calculated to endanger the peace and tranquillity of a community, already sufficiently heated and agitated. In the case of *Atherfold v. Beard*, (2 Term Rep. 610.) it was held, that a wager respecting the future amount of any branch of the public revenue was illegal, because it leads to an improper discussion, and is contrary to sound policy.

The case in which the Court of *King's Bench* has gone the greatest length, in supporting a wager, is that of *Jones v. Randall*. I have always considered that a very strange decision; and there is some reason to believe, that Lord *Mansfield* regretted that he had determined it as he did. I infer this from what afterwards fell from him, in the case of **Da Costa v. Jones*. "Never," says he, when the case of *Jones v. Randall* was cited, "was a question more doubtful, how it would be decided, till it was actually determined."

A wager, between two voters, with respect to the event of an election of a member of parliament, laid before the poll began, was decided to be illegal, on the ground that it was corrupt, and against the fundamental principles of the *British* constitution; that it was a gaming contract, not to be encouraged, and of a dangerous tendency. (*Allen v. Hearne*, 1 Term Rep. 56.) If, for such reasons, a bet of this description was considered to be void in *England*, how much is their force increased, when applied to an analogous case in our own country, in which the very existence of every department of the government depends upon the free and unbiased exercise of the elective franchise. There can be no doubt, I think, that if this wager comes within the spirit of the last-mentioned case, that it is void.

What are the facts, as stated in the record? The parties here are electors; *Riker* had already voted, but *Graham* had not; the bet was made on the last day of the election, in the city of *New-York*, and *Graham* resided in the middle district. I understood the defendant's counsel to admit, that if *Graham* could have given his vote, that the judgment below must be reversed. Now, it is for the defendant in error to show, that *Graham* was at such a distance from the town, in which he resided, and where only, I agree, he was entitled to vote, as to preclude the possibility of his getting there before the close of the poll. Nothing more is said about *Graham's* place of resi-

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dence, than that it was in the middle district. For aught that appears, the bet might have been made in the morning; the court knows that the county of *Rockland* is in the middle district; and there could be no difficulty in *Graham's* going to almost any town in that county, in season to give his vote. It is hardly expected that the court will intend any thing in support of such a contract as this; but without intending a great deal more than appears upon the record, *Graham* might have voted, had he been so disposed. For these reasons, I am of opinion that this wager is void.

I could have wished that the court had been prepared to decide, whether the act of the 19th March, 1802, does not make all wagers illegal; I am strongly inclined to think it does. I do not, at present, however, mean to express any opinion, on the construction of that act.

From the record it appears, the defendant in error has obtained judgment for the whole amount deposited in the hands of the stake-holders; hence it is not necessary to determine, whether the defendant can recover back his own deposit.

I am of opinion that the judgment below must be reversed.

KENT, Ch. J., and YATES, J., were of the same opinion.

SPENCER, J. The objection to the first count is, that it is not alleged that, in point of fact, the defendant received the money acknowledged in the memorandum to have been received; and that, as the memorandum is not a note within the statute, it ought to have been averred that the money was received by the defendant. The case of *Lansing v. M'Killip* (3 *Caines's Rep.* 286.) decides, that written agreements, not within the statute, can only be enforced on the ground of a consideration, and that the acknowledgment of value received, would not be evidence of a consideration, but that the kind and nature of the consideration ought to be shown. The authority of that case is extremely weakened, if not entirely overruled, by the case of *Jackson v. Alexander*. (3 *Johns. Rep.* 484.) If, however, the case of *Lansing v. M'Killip* is still to be considered as law, there is this difference between it and the present case; the precise consideration is confessed by the defendant, in the memorandum; and the only reason, which required an averment of the real consideration, where value was admitted to be received, was, that the court might judge whether, in reality, the consideration was such as to uphold the promise. The first count, then, seems to me to be free from objection, on the ground of consideration. The next objection is, that, under the second count, the facts stated in the bill of exceptions could not be given in evidence, on the principle,

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that *indebitatus assumpsit* will not lie on a wager. It does not appear to be clearly settled that an *indebitatus assumpsit* will not lie on a wager; but it is settled, that it will lie against the stake-holder. (3 *Salk.* 176. 1 *Bos. & Pul.* 3.) These observations dispose of the formal objections.

The second question involves a very important inquiry, though I cannot perceive that it is a difficult one. It has been contended that all wagers are unlawful at common law. After the very able, and I think unanswerable, opinions of Lord *Kenyon*, Justice *Ashurst*, and Justice *Grose*, given in the case of *Good v. Elliott*, (3 *Term Rep.* 693.) which was a wager upon the fact, whether one *Susannah Tye* had or had not, before a certain day, bought a certain wagon, I cannot think it necessary to enter upon the discussion of the question; Lord *Kenyon* says, and cites a variety of cases in his support, that from the earliest times, the books all speak the same language. Lord *Mansfield* says, in the case of *Da Costa v. Jones*, (*Cowp.* 729.) that "indifferent wagers upon indifferent matters, without interest to either of the parties, are allowed by the law of this country, so far as they have not been restrained by particular acts of parliament; and the restraints imposed in particular cases, support the general *rule." Indeed, it appears to me impossible to read the argument of the judges, in the case of *Good v. Elliott*, and examine the authorities they cite, without yielding to the position they maintain, that a wager, upon an indifferent subject, is recoverable in courts of law. There are, undoubtedly, limitations to the rule, that wagers are lawful; wagers inciting to a breach of the peace, or to immorality, or which affect the feelings or interests of a third person, or expose him to ridicule, or libel him, and also wagers against sound policy, are illegal. Under those of the last description, may be classed the case of *Allen v. Hearne*, (1 *Term Rep.* 56.) which was a wager between two electors, before the poll began, on the election of the candidates, for whom they were partisans, and in which they had taken decided parts, on opposite sides. This was decided, on very sound principles, to be void, as being corrupt, in the eye of the law, and against the fundamental principles of the constitution, which required that the election of members of parliament should be free, and that every voter should be exempt from pecuniary interest in giving his vote, which could not be the case, when the electors were under a pecuniary influence. The present case is a bet on the election of the executive magistrate; and were the parties situated as they were in the case of *Allen v. Hearne*, most undoubtedly the bet could not be recoverable. But here *Riker* had already voted, and was, therefore, free from any influence the bet could have; and from the facts in the case, it appears, that *Graham*, though qualified to vote, and though he had not voted, could not be influenced by the bet, because it was morally impossible for him to vote; for the statute regulating elec-

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tions allows him to vote only in the town or ward wherein he resides ; and the bet was laid in the city of *New-York*, and *Graham* resided in the middle district.

The counsel for the plaintiff in error very candidly admitted, that from the situation of *Graham*, he could not vote, *and therefore could not, so far, be influenced in his conduct, as an elector. But the verdict of the jury has, I think, settled this point; it was a matter of fact, peculiarly within their cognizance, whether *Graham* could vote at that election ; by finding for the plaintiff below, they have virtually passed on that fact, and decided that he could not. I will not intend, that the court below and the jury have disregarded the law on that point ; after a verdict, every reasonable intendment should be made to support it.

It was, however, contended, that bets of this kind may produce an inquiry into the decision of the canvassers, and may involve the country in confusion. This argument, I think, cannot be maintained, since the statute renders the decision of the canvassers conclusive and final ; thus excluding all inquiry into the purity and propriety of their decisions, as effectually as the law excludes such inquiry into the judgments of courts. The bet, then, is reduced to this, that the decision of the canvassers, certifying the one or the other candidates to be elected, decides the event, on which the wager was laid. The present wager, in my opinion, is by no means so alarming, as one upon the administration of the laws ; and yet in the case of *Jones v. Randall*, (*Coup*. 37.) which was a wager of 50'guineas, whether a decree of the Court of Chancery would be reversed, on appeal to the house of lords, it was held by the whole Court of King's Bench, that the wager was neither against the law, nor sound policy. Under the circumstances of this case, I cannot perceive that the wager can be objected to, on either of those grounds.

It has been urged, that the 5th section of the statute to prevent horse-racing, and for other purposes, operates to render all wagers illegal ; it enacts, "*that all and every contract thereafter to be made, and entered into, for or on account of any sum or sums of money, *or other thing, bet or staked, or depending on any such race or races as aforesaid, or concerning the same, or for, or on account of any gaming by lot or chance, of any kind, or under any description whatever, shall be deemed and adjudged void in law,*" &c.

I apprehend, that under the terms gaming by lot or chance, betting on a contingent event cannot be included. Betting on an event does not, in common parlance, mean gaming. By the statute of 9 *Anne*, c. 14. from which our statute to prevent excessive and deceitful gaming, is, in substance, taken, all notes, &c. given or executed by any person, where the whole or any part of the consideration shall be for any money, won by playing at any game whatsoever, are declared to be void. The

same statute enacts, that every person who shall at any time, or sitting, by playing at any game, lose in the whole the sum of 25 dollars, and shall pay it, he may sue and recover it back of the winner. Now, if betting on a contingent event be gaming, the persons betting, undoubtedly, by the act of betting, play at that game, and consequently betting upon any event would be brought within the statute of *Anne*, and our statute to prevent excessive and deceitful gaming, an idea which, I presume, never has been entertained; for in *England*, (5 *Burr.* 2802. *Cowp.* 37.) actions have been sustained on wagers in a variety of instances, since the statute of *Anne*, and this objection was never thought of, though the bets exceeded the sum of 10*l.* the sum beyond which, money lost by gaming might be recovered back. I conclude, therefore, that the gaming mentioned in the 5th section of the statute to prevent horse-racing, must be some play of lot or chance, and that betting upon an indifferent subject, without any playing, never can be comprehended within the statute.

In the case of *Good v. Elliott, Grose, J.*, denies that wagers are void, as gaming contracts. Lord *Mansfield*, in the case of *Da Costa v. Jones*, says, "Whether it would not *have been better policy to have treated all wagers, originally, as gaming contracts, and to have held them void, is now too late to discuss; they have too long and too often been held good and valid contracts."

The evidence of the fact that *Daniel D. Tompkins* was elected governor in 1807, appears to have been full; the defendant's confession, and promise to pay the amount of the note, after he had seen *Graham*, were alone sufficient to warrant the jury in drawing the inference that he admitted the bet to have been lost; but I perceive no objection to the evidence given by one of the canvassers. He stated, that, by the canvass, Mr. *Tompkins* was declared to be governor. Though the exemplification of the certificate might have been higher evidence, still the fact was shown sufficiently, and no inference could be raised against the defendant in error, in not producing the higher evidence.

In my opinion, the judgment ought to be affirmed.

THOMPSON, J., not having heard the argument in the cause, gave no opinion.

Judgment below reversed. (a)

(a) Wagers upon the result of an election, whether laid *before* or *after* the election, are void as being illegal. *Smyth v. M^r Masters*, 2 *Browne's Reports*, 182. *M^r Allister v. Hoffman*, 16 *Serg. & Raw.* 147. And this principle extends to a wager on the election of a sheriff, if the wager be laid between persons residents of the county, and voters at the election. *Wroth v. Johnson*, 4 *Har. & M^r Hen.* 264. It has been held, in *Pennsylvania*, that a wager concerning any human

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being is not recoverable; and that, therefore, a wager whether *Napoleon Bonaparte* would, within a specified time, be removed or escape from the island of *St. Helena*, was illegal and void. *Phillips v. Joss*, 1 *Rawle*, 36. In *South Carolina*, a wager on a horse-race is illegal. *Haskett v. Wootan*, 1 *N. & M. Cord*, 180. And the law is the same in *North Carolina*. *Wood v. Wood*, 2 *Murph.* 172. It has been held, however, in *Pennsylvania*, that wagers fairly won are recoverable, unless founded on a transaction which is *immoral, illegal* or *indecent*. *Morgan v. Richards*, 1 *Brown's Rep.* 171. This is in conformity with the law of *England*, where, indeed, another exception is also made—that the wagers must not be of so frivolous or ludicrous a nature that it would be beneath the dignity of a court of justice to try them. It seems difficult to determine what constitutes such a wager; for it has been held, that the plaintiff might recover upon a bet of six to four that *Bob Booty* would win the plate at the new *Litchfield* races. *M'Allister v. Haden*, 2 *Camp. Rep.* 436. So also on a wager of a rump and dozen, whether the defendant was older than the plaintiff. *Hussey v. Crickett*, 3 *Camp. Rep.* 168. The court seem to have been somewhat doubtful as to this particular wager. The counsel for the plaintiff found it necessary to urge that it was for the public benefit to promote conviviality and good humor, and, therefore, no public prejudice could arise from it. The chief justice, Sir *James Mansfield*, declared, that "he did not, *judicially*, know the meaning of a rump and dozen;" but *Heath, J.*, said, "We know very well, *privately*, that a rump and dozen is what the witnesses stated. *viz.* a good dinner and wine, in which I can discover no illegality;" and *Chambre, J.*, agreed with him. Lord *Loughborough* refused to try a cause on a wager, "whether there were more ways than six of nicking seven, on the dice, allowing seven to be the main, and eleven a nick to seven," and directed the cause to be stricken out of the paper when it came on for trial. *Brown v. Leeson*, 2 *H. Blackst. Rep.* 43. This, however, was a wager on an illegal game; and *Heath, J.*, expressly says in it, "that all games at dice, except *backgammon*, are prohibited by law."

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A vessel was insured, "at and from *Calcutta* to *New-York*, with liberty to touch at *Madras* for trade, and to take in part of her cargo there." The vessel went to *Madras*, and sailed thence, direct for *New-York*, without ever going to *Calcutta*.

In an action brought by the insured to recover back the premium, it was held, that the voyage insured did not commence; and that, as the policy never attached, the insured was

THIS was an action of *assumpsit*, for money had and received by the defendants to the plaintiff's use. The defendants gave a *cognovit actionem* for 1,900 dollars, subject to the opinion of the court upon the following case, agreed between the parties.

The plaintiff was owner of the ship *Egeria*, and had insurances made, on the 9th *February*, 1808, by the defendants, upon the ship, and upon the freight of all goods, wares and merchandises, laden or to be laden on board the said ship, on a voyage "at and from *Calcutta*, with liberty to touch at *Madras*, for trade, and to take in a part of her cargo," beginning the said adventure "at and from *Calcutta*, and to endure until her arrival at *New-York*, valued at the sums insured respectively."

entitled to a return of premium.

In *June*, 1807, the defendants had insured for the plaintiff the same ship, on a voyage at and from *New-York* to *Madeira*, and at and from thence to *Calcutta*, with leave to touch and trade at the *Cape of Good Hope*, and at *Madras*. The ship sailed from *New-York*, arrived at *Madeira*, and sailed from thence, on the 29th *August*, 1807, touched at the *Cape of Good Hope*, and from thence went to *Madras*, where she arrived on the 5th day of *May*, 1808, and sailed from thence on the 15th day of *July*, 1808, direct to *New-York*, without going to *Calcutta*.

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Pendleton, for the plaintiff. The adventure was to begin at *Calcutta*, and continue at and from thence to *New-York*. The vessel did not proceed farther than *Madras*, and never was at *Calcutta*, so that the voyage insured has never commenced. As there was no responsibility or *risk on the part of the defendants, the plaintiff is entitled to have the premium returned. I do not find any adjudged case, precisely in point; but on general principles the defendants can have no right to retain the premium. (1 *Johns. Cas.* 184. *Silva v. Lou.* 1 *Atk.* 543. *Park*, 296. 388. 1 *Marshall*, (2d ed.) 183. 203. [He was stopped by the court.]

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C. I. Bogert and *S. Jones*, contra. This case does not come within that of *Graves* and *Scriba v. The Marine Insurance Company*, (2 *Caines*, 339.) In that case there was a prior insurance, which completely covered the outward cargo, and there was no cargo taken on board at *Vera Cruz*, where the voyage in question was to commence, so that the policy did not attach. The present case is analogous to that of *Vredenberg v. Gracie*. (a) It may be compared *to an insurance to

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(a) The case of *Vredenberg v. Gracie* was decided in *January* term, 1799, by *Leasing*, Ch. J., and *Lewis*, J., (*Benson*, J., dissenting,) and the decision seems to have turned on the evidence of the understanding and contract between the parties, as to the subject insured, and the time of the commencement of the risk. As this case has been frequently mentioned at the bar, and seems not to have been fully understood, I give the following note of it, with which I have been favored by a friend.

A verdict was taken for the plaintiff, subject to the opinion of the court, on a case containing the following facts:

This was an action on a policy of insurance on goods, on board the brig *Nancy*, at and from any port or ports in the *West Indies*, and at and from thence to *New-York*, "beginning the adventure on the said goods, from the loading thereof on board in the *West Indies*," and to continue until landed in *New-York*. The goods in question were shipped on board in *New-York*, and the vessel proceeded to the *West Indies*, without their being insured. The owner of the goods received a letter from the captain, informing him that he had arrived at cape *Nicholas-Mole*, in *St. Domingo*, where he had disposed of a small part of his cargo, and intended to proceed to *St. Mark's* with the remainder; which letter was shown to the underwriters, at the time of their subscribing the policy. The vessel, with the same goods on board which she carried out, on her passage to *St. Mark's*, was captured and condemned by the *French*. The broker who made the insurance testified, that he mentioned to the underwriters, at the time of their subscribing the policy, that it was the same property, which the vessel carried out, which was to be insured. Another insurance broker deposed, that

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several ports, where the insured may shorten the risk, by dropping a port. There were two outward ports, from either of which the voyage might commence. *Madras* was in the *iter* of the voyage insured. If the *terminus ad quem*, where there

it was frequent to insure goods, which were laden on board at one place, and to begin the risk at another; and the words, from the loading thereof on board, were always mentioned to be at the place where the risk commenced, and he never knew any controversy arise from the goods being actually laden on board at a different place from the one mentioned in the policy; although the case frequently happened. It was admitted that the plaintiff had an interest on board, and that he had abandoned in due season.

The case was argued by *Hamilton* and *Pendleton*, for the plaintiff, and by *Harrison*, for the defendant.

For the *defendant* it was contended, 1. That this insurance was on the homeward voyage; and that as the vessel, at the time of capture, had on board the outward bound cargo, and as the outward risk did not terminate until the goods were landed, it was clear the risk on this policy had never commenced, and therefore the plaintiff could not recover for the loss, but was entitled only to a return of premium.

2. That the words of the policy were conclusive against the plaintiff. They were expressly on goods to be laden on board in the *West Indies*: and the goods in question were laden on board in *New-York*. There would be a much greater risk on goods that had been a considerable time on board, than on those which had been recently shipped, especially where the articles were of a perishable nature. It was also contended, that the testimony of the brokers ought to be rejected, because it was admitting *parol* evidence, to vary a written contract; and that the case referred to by *Holt*, Ch. J., in *Bates v. Graham*, (*Salk*. 444.) to prove that a policy in writing might be altered, on *parol* evidence, was an authority to the contrary. It was the case of *Kaines v. Knightly*, (*Skin*. 54.)

For the *plaintiff* it was contended, that, by the terms of the policy, the risk commenced immediately on the arrival of the vessel in the *West Indies*. The words *at and from* mean immediately at and from. (*1 Atkyns*, 545. *1 Bl. Rep.* 417, *Camden v. Cowley*.) This was clearly the intention of the parties here, for there was no outward insurance, which was a fact known to the underwriters. The words, "*beginning the adventure from the loading thereof on board*," were introduced into *English*, and thence into *American* policies of insurance, to exclude the risks, while the goods were going from the shore to the vessels, in boats. In most other parts of *Europe*, the policies were different, and the insurers were liable for such losses.

The sense, and even literal meaning of the words, import no more than "from the time of the goods being on board," referring to the time of the commencement of the risk, rather than the place. It is of no importance to the underwriter, where the goods were actually laden on board; they are at his risk only from the time of their being actually on board, at the place mentioned in the policy as the beginning of the adventure. (*Dolan v. Stoddart*, *1 Term Rep.* 26.) If there was a fraudulent concealment, or the goods had been long on board, and were of a perishable nature, it would be a different case. (*Hodgson, v. Richardson*, *1 Bl. Rep.* 405.)

LEWIS, J. The objection to the recovery in this case is, that the vessel left a port in the *West Indies*, before she had discharged her outward cargo, and was captured while going from thence to another island, and that, therefore, the insurance on the outward voyage still continued, for there could not be two insurances for the same goods.

It is admitted that there cannot be a double insurance; but it does not appear that there was any insurance on the outward voyage. The principle of the *English* law, that the insurance on the outward bound cargo continues until the goods are landed, most probably depends on the language of the *English* policies, which are expressed in that manner.

The first adjudication on the subject was in the reign of *James II.* and it does not appear what was the language of the policy. It might have been in the modern form. But it is not, in my opinion, necessary, in this case, to decide what would be the construction on a policy in which that clause was omitted. It appears by the testimony of the broker, that the underwriters were informed

*are several ports, may be varied, for the same reason, the *terminus a quo* may be changed, where two ports are named, if the *iter* is not thereby changed. The insured had a right to elect to commence the voyage either at *Calcutta* or *Madras*. Though he could not go first to *Madras*, and then to *Calcutta*, he might come home direct from *Madras*, for it shortened the voyage, and *greatly diminished the risk. (2 *Johns. Rep.* 264.) Suppose that, instead of two separate policies of insurance, on the outward and homeward voyages, there had been but one policy for the voyage round, might not the insured have dropped the port of *Calcutta*, without its being a deviation?

In the case of *Hog* and another v. *Bogle* and *Scott*, (*Millar on Ins.* 402.) a ship lying at *Dundee* was insured from the *Frith of Forth* to *Campvere*. The ship sailed from the *Frith of Tay*, and came in safety within the *course* taken by ships going from the *Frith of Forth*, that is, within two miles of the isle of *May*; and Lord *Mansfield* was of opinion, that if the ship came with safety into the *usual course* of the voyage, it was no matter from whence she came prior to that, or whether she sailed from the *Frith of Tay*, or the *Forth*. There is no reason why a voyage may not be shortened at one end, as well as at another. The construction for which we contend is favorable to the insurer, as it diminishes the risk, and his assent to the change is to be presumed.

Pendleton, in reply. The fallacy of the argument on the other side is this, that if a vessel is permitted to touch at a port, that port makes a part of the voyage; but such permission is a mere excuse for a deviation. It is said that the voyage is shortened; but there is no evidence of that fact. The insurer had a right to calculate that the insured would not use the permission to touch at *Madras*, if the goods could be obtained at *Calcutta*, or the voyage had commenced there. Suppose the vessel had touched at the *Cape of Good Hope*, instead of *Madras*, on her way home, would the policy have attached? The

where the vessel then was, and it was clearly the intention of the parties to insure her on a trading voyage, from port to port, and home.

This being the undertaking of the parties, it cannot be material, whether she landed her outward bound cargo and took it again, or another cargo on board. She was in quest of a market, and the parties clearly understood that the insurance was to commence, *at furthest*, on her quitting the first port in the *West Indies*, after the subscription of the policy. I am of opinion, therefore, that judgment ought to be entered for the plaintiffs.

LANSING, Ch. J., was of the same opinion.

BROWN, J., dissented; he was of opinion, that the insured were entitled to recover for such goods only as were actually shipped in the *West Indies*.

RADCLIFF, J., not having heard the argument of the cause, gave no opinion.

KENT, J., having formerly been counsel in the cause, gave no opinion.

Judgment for the plaintiff.

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voyage would clearly have been shortened. The insured may stop short in the voyage, and demand a return of premium; but the voyage must have been commenced. The voyage insured in the present case never had a beginning, and cannot, therefore, be said to have existed. *The outward and homeward voyages are distinct, and the latter only was insured by this policy. If the vessel could have commenced her voyage at *Madras*, she might have done so at any other place in the track of the voyage described, though not mentioned in the policy.

In the case cited from *Millar*, the vessel was at another place, and was to come to the *Frith of Forth*, where the voyage insured was to commence, and she did actually come within the *Frith of Forth*. The reasoning of the court, in the case of *Silva v. Low*, (1 *Johns. Cas.* 184.) shows how much strictness is observed, as to the *identity* of the voyage insured.

THOMPSON, J., delivered the opinion of the court. There must, I think, be a return of premium in this case, on the ground that the policy never attached, and of course the underwriter not exposed to any risk. It is impossible to say, that a voyage from *Madras* to *New-York*, is the same as a voyage from *Calcutta* to *New-York*. The parties have stipulated expressly in the policy, that the adventure is to begin *at and from Calcutta*, and we have no right to substitute any other place. As this was an insurance to commence abroad, unless the underwriters knew something respecting the outward voyage, it would be very natural for them to require a representation, as to the situation of the ship, whether she was at *Calcutta*, or where, and when she was expected there, in order that they might judge of the risk.

In this case, the defendants being the insurers on the outward voyage, which was to terminate at *Calcutta*, wanted no information on this subject; they were possessed of all the information necessary, in order to make a calculation with respect to the risk, to which they were exposed. (1 *Bos. and Pull.* 200.) *Park*, in speaking of a risk, says, where insurance is made on the homeward *voyage, the beginning of the adventure must always depend upon the inclination of the insured, as expressed in the contract, (*Park*, 23.) In the case of *Graves and Scriba v. Marine Insurance Company*, (2 *Caines*, 342.) Mr. Justice *Livingston*, in giving the opinion of the court, says, when it is agreed that the risk shall commence from the lading of goods at a particular port, this is so far from being a nugatory provision, which we have a right to say means nothing, that the underwriter has a palpable interest in exacting a literal compliance, or to consider himself exonerated. The assured having a right to touch at *Madras*, cannot vary the case; this is not in the direct *iter* of the voyage from

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Calcutta to New-York; and if it was, I should not think it would be competent for the assured to select, at his pleasure, any point of the *iter*, and say the voyage insured shall commence there. Whether the risk was increased or diminished by the ship's not going to *Calcutta*, may be uncertain; it is enough, that the parties have, by their contract, designated that as the place where the risk is to commence, and it is not competent for the court to substitute any other in its stead. The *termini* of the voyage afford the surest criterion, by which to determine its identity. (1 *Johns. Cas.* 197. and cases there cited. 4 *East*, 130.)

The case of *Hog and Kinlook v. Bogle and Scott*, cited by the defendant's counsel from *Millar*, (402.) has no application, even if we admit the accuracy of the case. The ship, there, was insured from the *Frith of Forth*, to *Campvere*, and she sailed from *Dundee* to the *Frith of Forth*, or within the precincts of the *Frith of Forth*, and then pursued her voyage; she accordingly came to the place of departure mentioned in the policy, and from that time the policy may well be said to have attached. To make the present case analogous, the policy ought to have been from the *Cape of Good Hope* to *New-York*; and *then, perhaps, the policy would have attached on that part of the homeward voyage.

The opinion of the court, therefore, is, that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

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VAIL against LEWIS and LIVINGSTON.

THIS was an action of trespass on the case. The declaration contained three counts. The first count stated, that the plaintiff was indebted to *Lewis*, in the sum of 789 dollars and 58 cents, on a certain judgment obtained by *Lewis* against the plaintiff, in the Supreme Court, on the 16th *May*, 1808; that he, by *Livingston*, (the other defendant,) as his attorney, on the 5th *August*, 1808, sued out a *fiery facias*, on the said judgment, directed to the sheriff of *New-York*, against the goods and chattels, lands and tenements of the present plaintiff, returnable on the second *Monday of November* next thereafter; and that, before the return of the said writ of *fiery facias*, the said *Lewis*, by the said *Livingston*, as his attorney, on the 15th *August*, 1808, sued out on the same judgment, a writ of *testament fieri facias*, in the usual form, directed to the sheriff of

A sheriff has no authority to act under a *fiery facias*, after the return-day thereof.

If a sheriff levy a *fiery facias*, after the return-day has expired, by the direction of the plaintiff's attorney, he and the attorney are both trespassers.

An action of trespass, and not case, lies against a sheriff who serves an execution, after it has expired.

No action will lie against a plaintiff or his attorney, for neglecting to countermand an execution, after the return-day. Where the time laid in a declaration under a *scilicet*, is material, and the *gist* of the action, it shall be taken to be the true time, and the *scilicet*, if repugnant, is to be rejected as void, or if consistent, is to be held a direct affirmation. (*Gleason v. M^r Vickar*, 7 *Cow. Rep.* 42.)

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the county of *West Chester*, which was also made returnable on the second *Monday of November*, 1808. And the plaintiff averred, that the sheriff of the city and county of *New-York*, in obedience to the said writ of *fiery facias*, to him directed, afterwards, to wit, on the 23d day of *September*, 1808, levied of the goods and chattels of the plaintiff, the said sum of 789 dollars and 58 cents, together with his fees *and poundage, and then and there, paid to the defendant *Livingston*, as the attorney of the defendant *Lewis*, the said sum of 789 dollars and 58 cents, in full satisfaction and discharge of the said debt, as by the return of the said writ, &c., whereby, &c. Yet the said defendants, contriving, &c., afterwards, and after the said debt was so paid and satisfied, afterwards, to wit, on the 2d *December*, 1808, wrongfully, unjustly, and maliciously, and notwithstanding such payment and discharge, &c., caused and procured the sheriff of *West Chester*, to execute the said writ of *testatum fieri facias*; and that the said sheriff, notwithstanding such payment, &c., by virtue of the said writ of *testatum fieri facias*, &c., and under color and pretence of the same, and the said judgment specified therein, at *Rye*, in the said county of *West Chester*, caused to be levied of the goods and chattels of the plaintiff, to wit, 1,000 barrels of flour, &c., to the value of 20,000 dollars, and the said flour so levied on, did, according to law, then and there, publicly advertise for sale at auction, on the 10th *December*, 1808, on which day, &c., in satisfaction of the said writ, the said sheriff did sell and dispose of the said goods and chattels, to the great damage and loss of the plaintiff, whereby his credit in business was, hath been, and is, by occasion, &c., greatly shaken, impaired and diminished, &c.

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The second count stated the issuing of the *testatum fieri facias* to the sheriff of *West Chester*, and averred the payment and satisfaction of the debt, afterwards, to wit, on the 23d *September*, before the *test. fi. fa.* was levied, and although the defendants might and ought to have countermanded the execution of the *test. fi. fa.* by the sheriff, to whom it was delivered, so as to have prevented the goods and chattels of the plaintiff from being sold by virtue thereof; yet disregarding their duty, &c., the defendants, or either of them, did not countermand the execution, &c., whereby, &c., the sheriff afterwards, *&c., (as in the first count.) And after the said plaintiff had so paid and satisfied the said debt, &c., mentioned in the said writ of *test. fi. fa.* and before the return thereof, to wit, on the 2d *December*, 1808, caused to be levied, &c. (as in the first count.)

The third count was similar to the first.

There was a general demurrer to the declaration and joinder.

Slosson, in support of the demurrer. 1. The action should have been *trespass*, and not *trespass on the case*. The *test. fi.*
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fa. having expired, the sheriff of *West Chester* had no authority to make the levy, which he made on the 2d *December*, long after its return day, so that the injury was a trespass. It is true, the declaration states that the levy was made before the return of the writ; but this can only mean, that it was before the writ was actually returned and filed in the clerk's office. A writ cannot be served after the return day has expired. In the case of *Devoe v. Elliot*, (2 *Caines*, 243.) it was expressly decided, that all process must be served before the expiration of the return day. The same principle is to be found in the case of *Harvey v. Broad*. (6 *Mod.* 148. 159. 196. 8 *Mod.* 225. 2 *Tidd's Prac.* 1072. 10 *Viner, Execution*, A. a. 568.)

The bare delivery of the writ to the sheriff does not divest the property of the defendant named in the execution, nor give the sheriff such an interest, that he may, after the return day, proceed to levy and sell. In the case of *Smallcomb v. Cross* and others, (1 *Ld. Raym.* 252. 10 *Viner*, 566. *Comb.* 145. 2 *Eq. Cas. Abr.* 381. 4 *East*, 539, 540. *Tidd's Prac.* 915.) Chief Justice *Holt* says, "that if a writ of execution be delivered to the sheriff against *A.* and *A.* becomes bankrupt before it is executed, the execution is superseded, and, consequently, the property of the goods is not absolutely bound by the delivery of the writ to the sheriff."

This action is on the ground of a malicious execution of the writ; but if the writ, on the face of it, had expired and was dead, it could not, by law, be executed. *The proceedings, afterwards, were, therefore, a trespass; and trespass on the case does not lie; this, on a general demurrer, is a valid objection. Where the injury is immediate, it is trespass; where it is consequential, trespass on the case is the proper remedy. If the defendants did order the sheriff to levy the execution, after it had expired, they, as well as the sheriff, were trespassers; for in trespass, all are principals. (3 *Wils.* 377.)

Again, if, by the operation of law, the execution became dead, after the time of its return had expired, it was not the duty of the attorney to countermand it. It would have been an act of supererogation in him, to direct the sheriff not to execute a writ, which by law he could not execute.

2. No action will lie against the defendant *Livingston*, who was the attorney of *Lewis*. The declaration states, that *Lewis*, by his attorney, *Livingston*, issued the execution, &c., and that by him, he ought to have countermanded it.

Whenever an attorney acts in the course of his professional duty, he is not personally answerable, unless he acts without the authority of his client, or is guilty of irregularity. (1 *Mod.* 209. 3 *Wils.* 388.) It appears from the declaration, that *Lewis* did not direct *Livingston* to countermand the *test. fi. fa.* he was, therefore, justified in proceeding.

If there be one of several defendants, against whom no

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cause of action exists, this may be taken advantage of on a general demurrer. (*Henly and Broad's case*, 1 *Lev.* 41. pl. 5. *Sir John Hayden's case*, 11 *Co.* 56. s. 1. *Hob.* 164. 199. *Cro. Eliz.* 30.)

3. The plaintiff, in his declaration, ought to have stated a request to *Lewis*, or to his attorney, to countermand the *test. fi. fa.* since he knew that it was in the hands of the sheriff. (1 *Bos. & Pull.* 388.)

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**Hoffman* and *Emmet*, contra. Admitting that the sheriff cannot levy an execution after the writ has expired, yet the declaration sets forth a good cause of action. This is not an ordinary action on the case for an illegal act. It is founded on the *malice* of the defendants; it is in the nature of an action for a conspiracy, for contriving and confederating together, to injure the plaintiff, and of issuing the *test. fi. fa.* with that intention, and for that purpose. The *gist* of the action is malice. In this view of the action, there can be no doubt, but that *Lewis* and his attorney may be joined.

The levy is alleged to have been made before the return of the writ, to wit, on the 2d *December*. Where the day is alleged under a *scilicet*, the plaintiff may, at the trial, prove another day, as the true day as the 2d *September*. He is not confined in his proof to the exact day. Where the day is not essential, it cannot be objected, on a general demurrer, that the day is wrong. In ejectment, if the *ouster* is laid before the demise, but under a *scilicet*, the day mentioned may be rejected as surplusage. Where the allegation is that the levy was before the return of the writ, the court must intend it to be before the return day. Then, if the words, 2d *December*, after the *scilicet*, be rejected, the averment must be sufficient.

The case of *Barker v. Braham* and *Norwood*, (3 *Wils.* 368.) was an action of trespass, and the writ void *ab initio*. There is a difference between acting under a writ void *ab initio*, and a writ lawful and valid in its origin. It is to be observed, also, that in that case the attorney was joined with his client. In *Wentworth's Pleadings*, (vol. 8. p. 310.) there is an exact precedent for the declaration in this case, and which was, no doubt, followed by the attorney who drew it.

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*In the case of *Scheibel v. Fairbain* and another, (1 *Bos. & Pull.* 388.) though it was decided, that an action on the case would not lie for a mere neglect to countermand a writ, after the debt was paid; yet the court held, that if the injury was wilful and malicious, the action would be supported.

The present action is not for a nonfeasance, or neglect of duty, but for a wilful and malicious injury. The case of *Waterer v. Freeman* (*Hob.* 205, 206. 1 *Brownl.* 12.) is a stronger case than the one before the court. This is, substantially, an action for a malicious prosecution, (*Sel. N. P.* 940.) and is to be tested by the same principles as an action of that description. 368

Admitting that the action would not lie against *Livingston*, yet, as this is for a *tort*, there may be judgment against the other defendant.

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Slosson, in reply. If, at the trial, the plaintiff had proved a levy on the 2d *December*, he would have maintained the issue; the only way to take advantage of a wrong day, is by demurrer. If the time is material, it must be averred; and it is then traversable. Here the day was material, for it was essential whether the return day had expired before the levy, or not. Though the day be laid under a *scilicet*, yet if it be material, the words *before the day* may be rejected as surplusage. (5 *Com. Dig. Plead. C. 19.*)

If it be admitted, that no action lies against the attorney, then no judgment can be given against him, on this demurrer.

Where the act is not illegal, malice alone will not maintain this action.

VAN NESS, J., delivered the opinion of the court. Whether the defendants are liable at all for the injury of which the plaintiff complains, will depend upon a more perfect disclosure of facts hereafter. We are satisfied *that upon the case, as stated in this declaration, they are not liable, in this form of action.

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If the levy and sale by the sheriff of *West Chester* were made after the execution in his hands was returnable, he acted without authority; for after the return day of a *fi. fa.* the power of the sheriff under it is gone; and the plaintiff is put to a new execution, if he wishes to pursue the defendant's property. (*Devoe v. Elliot*, 2 *Caines*, 243.) The latest period which the law allows for the service of an execution, is the day when it is returnable. This position the plaintiff's counsel seemed to admit. To avert the consequences resulting from it, they contended, that it is not positively averred, that the levy and sale were made after the return day of the execution. This leads to a consideration of the point, whether the day on which the levy is stated to have been made in this case, is material or not, or, in other words, whether the plaintiff, upon a trial, may be permitted to prove that the levy was made on any other day than that laid in the declaration.

I consider the day, here, to be material, and, consequently, that the plaintiff would not, on the trial, be permitted to prove the service of the execution on any other day than that stated in the declaration. If we are correct in this, it will be found, either that the defendants are not liable at all, or, if liable, that this is not the proper form of action. The plaintiff is bound to show, not only that he has sustained an injury, for which the law gives him a right of action, but also that he has such right, in the particular form of action, to which he has resorted for a satisfaction. The *gravamen*, in the first count, is, that the

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defendants maliciously caused and procured the sheriff of *West Chester* to execute the *test. fi. fa.* in his hands, after the payment of the judgment to the sheriff of *New-York*, on the execution, previously delivered to him. And it is averred, that the sheriff of **West Chester* made his levy on the 2d day of *December*, (laid under a *videlicet*,) which was after the execution was returnable; and that he sold, on the tenth of the same month, which is also laid under a *videlicet*. If the levy and sale did, in fact, take place on those days, the sheriff was wholly unauthorized; and if the defendants caused and procured the proceedings, nothing can be clearer, than that they are all *trespassers*, because the taking the plaintiff's property, in that case, was unlawful, and the injury resulting therefrom was direct and immediate, and not consequential. It is in this point of view, that we deem the day here to be material.

The general rule of law on this subject is laid down with great precision and accuracy, by Sir *William Blackstone*, (*arguendo*,) in the case of the *Bishop of Lincoln* and another v. *Wolfreston*. (1 *Bl. Rep.* 495.) "The true distinction," he says, "is, that where the time at which a fact happened is immaterial, and it might as well have happened at another day, there, if alleged under a *scilicet*, it is absolutely nugatory, and is, therefore, not traversable; and if it be repugnant to the premises, it shall not vitiate the plea, but the *scilicet* itself shall be rejected as superfluous and void. But where the precise time is the very point and *gist* of the cause, there the time alleged by a *scilicet* is conclusive and traversable; and it shall be intended to be the true time, and no other," &c.

It was said on the argument, that as the day in this case was laid under a *scilicet*, the plaintiff was not bound to conform his proof to the particular day stated. This is true only when the day is immaterial; the well-settled rule being, that if the day laid be material, it must be proved, notwithstanding it be laid under a *scilicet*. (a)

(a) A material fact may be traversed or denied though laid under a *videlicet*. *Hastings v. Lovering*, 2 *Pick. Rep.* 223. *Gleason v. M'Vickar*, 7 *Conn. Rep.* 42. "The effect," says Mr. *Stephen*, "and object of the *videlicet* is to mark that the party does not undertake to prove the precise place. And, accordingly, there is some doubt whether the omission of a *videlicet* does not occasion a necessity, in the event of a traverse even of a transitory matter, of proving the place alleged. On the other hand, however, it is clear that, where the place is material, or, in other words, where the matter is local, the use of *videlicet* will not prevent the necessity of proving the venue laid. This doctrine as to a *videlicet*, it will be observed, is not peculiar to venue, but applies to many other points in which certainty is required in pleading." *Steph. on Plead.* 342, 343. (2d *Am. ed.*) See *Arnold v. Batc*, 3 *M. & S.* 173. *Bray v. Freeman*, 2 *B. Moo.* 114. *Crispin v. Williamson*, 8 *Taunt.* 107. *Draper v. Garratt*, 2 *B. & C.* 2. See also *Gould on Pleading*, 68, 69. *Jansen v. Ostrander*, 1 *Conn. Rep.* 676. *Att. General v. Jefferys*, 1 *M'Cl.* & *Y.* 277.

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It is of importance, that the boundaries between the different actions should be preserved, particularly between *the actions of *trespass* and *case*. In the case of *Seignac v. Roome*, (6 Term Rep. 125.) the judgment was arrested, after a trial and verdict for the plaintiff, because it appeared from the declaration, that the action ought to have been *trespass*, and not *case*. The case of *Bennus v. Guyldey*, (Cro. Jac. 505, 506.) is so exactly like the present, that I think it proper to state the substance of it. It was an action on the case. The declaration stated, that the defendant recovered a judgment against the plaintiff, part of which was afterwards paid, and the residue released; and the defendant covenanted that he would withdraw all process of execution for the same. The declaration further stated that the defendant, intending to vex him, &c., served a *ca. sa.* returnable 3 Trin. following, which he delivered to the sheriff to execute, who by force thereof, afterwards, to wit, on the 20th day of July, &c., arrested and detained him, until he paid the amount of the judgment. The defendant pleaded that the sheriff did not arrest by his appointment; to which plea, being vicious, the plaintiff demurred. At the argument, the defendant did not maintain the plea, but took several exceptions to the declaration, one of which was, that it was shown, *that the sheriff made the arrest on the 20th July, which was long after the return of the writ*; so it was done without warrant, and is *false imprisonment*, in the sheriff who took him by color of that process, and for that cause principally, the declaration was held to be ill by all the court.

The principles upon which this case was decided, have been repeatedly recognized since. (*Green v. Rennet*, 1 Term Rep. 656. *Pope v. Foster*, 4 Term Rep. 590.) We are of opinion, therefore, that the plaintiff cannot recover in this form of action, for the injury stated in the first count. (a)

*The second and third counts state the issuing of the two executions, with some immaterial variations, as in the first count; and that the amount of the judgment was paid by the plaintiff to *Livingston*, one of the defendants. The ground of complaint is, that after the payment of the judgment, the defendants were bound to have countermanded the service of the execution, delivered to the sheriff of *West Chester*, so as to have prevented the plaintiff's goods from being levied on and sold, &c., and that the defendants, *maliciously intending* to in-

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(a) Trespass will not lie for an act done under process, valid on the face of it, and regularly issued by a court of competent jurisdiction; but for an abuse of lawful process, *stienter et malitiose*, an action on the case is the only remedy. An *alias* execution, issued after the original one had been paid, but returned endorsed on a judgment not appearing from the record to be satisfied, reversed, or set aside, is a valid execution, and the debtor, if aggrieved, can obtain redress only by *audita querela*, or an action on the case for a wrongful and malicious abuse of the authority of the law. *Luddington v. Peck*, 2 Conn. Rep. 700.

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jure the plaintiff, did not countermand, and that the sheriff of *West Chester* did afterwards, and before the "return of the execution, *to wit*, on the 2d *December*," seize, and, afterwards, sell the plaintiff's goods.

If it be true, that after the return of the writ, its force was spent, then the defendants certainly had no reason to apprehend that the sheriff would proceed upon it, and they were under no legal or moral obligation to countermand it. It being unlawful for the sheriff to proceed, they had a right to presume that he would not proceed. The sheriff acted without any directions from them, and it would, therefore, be unjust to hold them responsible for his misconduct. (a) In this state of the case, it cannot but be seen, that the day of the levy becomes the turning point, and is, therefore, an important and material fact. That being the case, the plaintiff is bound by the very day laid in the declaration. The allegation, that the defendants, "wilfully and maliciously," neglected to countermand, and prevent a further proceeding on the execution, does not alter the case; for, if the law did not impose it upon them, as a duty to countermand, then omitting to do so, whatever may have been their motives for the omission, will not subject them to an action.

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It was said by the plaintiff's counsel, that in these two counts, it is alleged, that the levy was made "before the return of the execution," and that the day, (2d *December*,) *afterwards, being laid under a *scilicet*, ought to be rejected as surplusage. The declaration then would stand without any day, as to the time when the levy was made. Without stopping to inquire how far it would be vicious for that cause, I proceed to give the more conclusive answer to this argument. A *scilicet* repugnant to the preceding matter is void, and may, of course, be rejected as surplusage. But when a *scilicet* is not repugnant to the preceding matter, but will agree with it, then the *scilicet* is a direct affirmation, and shall be taken positively. The levy here is said to have been made "before the return of the execution." This may well mean, and so it ought to be understood, before the actual return of the execution, into the office; and then it is entirely reconcilable with the time when it is alleged the execution was served, viz. the second of *December*.

(a) The general rule is, that, where the subject matter of any suit is not within the jurisdiction of the court applied to for redress, every thing done is absolutely void, and the officer, as well as party, is a trespasser; but when the subject is within the jurisdiction of the court, and the want of jurisdiction is to the person or place, then the officer is excused, unless the want of jurisdiction appear on the process. *Smith v. Shaw*, 12 *Johns. Rep.* 257. Trespass lies against a party at whose instance a void warrant is issued against a person privileged from arrest. *Curry v. Pringle*, 11 *Johns. Rep.* 444. But neither the sheriff nor the plaintiff is liable to an action of trespass for arresting an insolvent debtor who has been duly discharged, and who is not liable to be detained in custody. *Cameron v. Lightfoot*, 2 *W. Black. Rep.* 1190. *Laddington v. Peck*, 2 *Conn. Rep.* 700. *Tarlton v. Fisher*, 2 *Doug. Rep.* 671.

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The case of *Treswaller v. Keyne*, (Cro. Jac. 620.) appears to be in point. Without giving any opinion on the other points raised in the argument, we are of opinion, that the demurrer is well taken, and that the defendants are entitled to judgment.

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Judgment for the defendants.

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THIS was an action for money paid, laid out and expended by the plaintiff, for the defendant, at his request. The defendant pleaded *non assumpsit*, and the statute of limitations. The cause was tried at the last sittings in *New-York*.

The defendant, on the 15th July, 1794, became bound as principal, to the *United States*, in the penal sum of 4,620 dollars, for securing certain duties, payable to the *United States*, on a cargo of salt, imported into *Baltimore*, amounting to 1,869 dollars and 15 cents; and the plaintiff, at his request, became his surety in the bond. The amount of the bond was paid by the plaintiff to the collector of *Baltimore*, who gave him the following receipt: "Received at *Baltimore*, August 21st, 1795, from *Nicholas Sluby*, 1,869 dollars and 15 cents, it being for duty on salt imported by *Oliver Champlin* in the ship *Argo*, Captain *Schale*, entered, and the duties bonded for by him, with *Nicholas Sluby*, as security to the said bond."

The defendant left *Baltimore* in August or September, 1794, at which time *Sluby* was absent, and his agent, in behalf of *Sluby*, applied to the defendant, before his departure, to indemnify him against the payment of the bond; and the defendant answered, that he expected to return before the bond became due, and would provide for the payment of it.

The clerk of the plaintiff also testified, that the defendant was supercargo of the said ship *Argo*, in which the salt was imported; that *Daniel Parker* is credited with the amount of sales of the salt, and other articles, in the books of *Nicholas Sluby & Co.*, and is debited by them *with the bond given for the duties on the salt, and other articles; and that there is a balance due *Sluby & Co.* on the said account of 2,056 dollars and 31 cents; and at the bottom of *Daniel Parker's* account, in the ledger of *Sluby & Co.*, is a memorandum in the hand-writ-

Where the witnesses to a bond are absent out of the state, proof of their hand-writing is sufficient, without proving the hand-writing of the obligor. (a) Where a bond with sureties is given to the *United States* for duties, and A. is mentioned as the importer, and B., the surety, pays the bond, he may maintain an action of *assumpsit* against A., though, in fact, a third person was the real owner of the goods. The possession of the bond, and the collector's receipt, was held sufficient evidence of the payment by the surety. If the defendant, on being arrested

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to prevent the operation of the statute of limitations. (b)

(a) *Isiah v. Druze*, 4 Wend. Rep. 313. 6 Cow. Rep. 165.

(b) See *Sands v. Gelston*, 13 Johns. Rep. 511, and the American cases there cited, and *Purdy v. Austin*, 3 Wend. Rep. 187, and the American cases there referred to; see also *Bradley v. Field*, 3 Wend. Rep. 272

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ing of the plaintiff, as follows: "The balance of this account is due from either *Daniel Parker* or *Oliver Champlin*, except what has been paid to *Trumbull, Forbes & Co.* as per their accounts. *Nicholas Sluby.*"

It appeared that *Sluby & Co.* had charged to *Daniel Parker*, in their books, several sums of money advanced to the defendant; and that no part of the balance of the account had been received from *Parker*.

The bond for the duties contained the following recital and condition: "Whereas, *Oliver Champlin* has imported in the ship *Argo*, whereof *John Schale* is master, which said ship arrived, and made due entry in the port of *Baltimore*, on the 15th *July*, 1794, sundry goods, &c., liable to pay duties, &c. Now the condition of the above obligation is such, that if the above bounden *Oliver Champlin, Nicholas Sluby* and *Stephen Casenave, &c.*, shall pay, &c., on or before the 16th *August* next, then," &c. There was but one witness to the bond, who was at the time a resident at *Baltimore*, but had been absent for a long time, in foreign parts, and when last heard of was at *Leghorn*.

The hand-writing of this witness was proved, and also that it was usual at *Baltimore*, to execute bonds of a similar nature, in the same way as the bond in question was executed, without affixing seals. The defendant's counsel objected to the proof of the execution of the bond, as insufficient, but the objection was overruled.

It appeared, that when the defendant was arrested, he did not deny the demand, but expressed his surprise that it had not been paid by *Parker*: and promised *to meet the plaintiff, for the purpose of settling the accounts, if the plaintiff would give time for the payment.

On this evidence, the defendant moved for a nonsuit, but the motion was overruled; and the judge charged the jury, that he did not think the evidence sufficient to warrant them in finding that the bonds were executed by the plaintiff, as security, on the exclusive credit of *Parker*; and if not, the defendant was liable. He, however, left it with the jury to determine, whether the plaintiff had become surety, on the credit of *Parker*, or of the defendant, and to find accordingly.

The jury found a verdict for the plaintiff, for 3,891 dollars and 4 cents; being the amount paid by the plaintiff, with interest from the time it was paid.

A motion was made to set aside the verdict, and for a new trial.

O. Edwards, for the defendant. 1. There was not sufficient proof of the execution of the bond. The proof was only of the hand-writing of the witness, and his absence. The hand-writing of the obligor ought, also, to have been proved. (5 *Term Rep.* 371.

KENT, Ch. J. Was not this point decided in the case of *Mott v. Dougherty*? (1 Johns. Cas. 230.)

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In that case, the witness was dead. The Court of K. B. in *England*, has decided, that the proof of the hand-writing of the contracting party is requisite. (7 Term Rep. 265. and note. *Wallis v. Delancey*, Doug. 93. and note.) By a statute of 26 Geo. III. c. 37. s. 38. bonds and deeds, executed in the *East Indies*, when the subscribing witness resides there, are made evidence in *Great Britain*, on proof of the hand-writing of the parties, and the witnesses.

*If the doctrine, which will be contended for on the part of the plaintiff, existed, there would have been no necessity for such a statute.

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Proof of the hand-writing of a witness is not the highest evidence. The rule is not to be taken in an absolute and unqualified sense; such evidence is to be received no further than is necessary. If it should be allowed, in all cases, simply to prove the hand-writing of a witness who is absent, frauds might be easily practised, by procuring any vagabond as a witness, and proving his hand-writing.

2. There was not sufficient proof of the payment of the money; the collector's receipt was not, of itself, sufficient evidence.

3. The proof of the acknowledgment of the debt was not sufficient to prevent the operation of the statute of limitations. It was made after the arrest of the defendant, and was not direct or positive.

Hoffman, contra. 1. It has been settled in *England*, that the proof of the hand-writing of the witness, who is beyond the jurisdiction of the court, is sufficient; (2 Sel. N. P. 474. 560. 2 East's Rep. 183. 250.) and it appears to have been so decided by this court, in the case of *Mott v. Dougherty*. I cannot discover any ground for a distinction between an absent witness and one who is dead. The supposed fraud or abuse may exist in the one case, as well as in the other; but we are not allowed to argue from the abuse of the rule, nor from the possibility that a fraud may be committed.

2. The proof of payment was positive, and the receipt is also produced.

3. The slightest acknowledgment is sufficient to take a cause out of the statute of limitations. In the case of *Bryan v. Horseman*, (4 East's Rep. 599.) it was held, that the acknowledgment of the defendant to the sheriff, who arrested him, that he owed the plaintiff, was sufficient. Though, *by the form of pleading, it is a new promise, yet it is considered as a revival of the former debt.

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4. The case of *Tom v. Goodrich* (2 Johns. Rep. 213.) is decisive on this point. The court will not look beyond the

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bond, which, on the face of it, is a bond with sureties. *Champlin* was the importer of the goods; and an implied *assumpsit* is raised by the bond, from him, as the principal, to his surety.

Harison, on the same side, was stopped by the court.

Wells, in reply. 1. The admission of the proof of the hand-writing of an absent witness, is certainly a departure from the ancient rule. It was first laid down by Lord *Mansfield*, (*Peake's N. P.* 100.) in the case of *Coghlan v. Williamson*. (*Doug.* 93.) It is admitted that the witness is living, and in a situation to be examined, under a commission; why, then, should the plaintiff be excused from producing the best evidence the nature of the case admits?

In the case of *Wallis v. Delancey*, (7 Term Rep. 266. note.) Lord *Kenyon* did not consider proof of the hand-writing of the witness who was absent as sufficient, without also proving the hand-writing of the obligor. In *Barnes v. Trompowsky*, (7 Term Rep. 266. note.) he admits the introduction of a new practice or rule. As this court have not, as yet, adopted the relaxation from the ancient rule, the propriety and expediency of such a relaxation may be considered.

The great expense attending the execution of a commission abroad, is one reason given, for adopting the relaxation in *England*. But the same difficulty and expense does not attend the executing commissions in this country. Courts have gone far enough, in admitting proof of the hand-writing of witnesses who are dead.

The reason assigned for receiving evidence, as to the hand-writing of absent witnesses, is, that they are out of the jurisdiction of the court. It is only for a witness, then, to cross the *Hudson* into *New-Jersey*, to enable the *party to give the secondary, or inferior species of evidence, arising from the proof of his hand-writing. There is no hardship in requiring the additional proof of the hand-writing of the obligor.

In the case of *Mott v. Dougherty*, the witness was dead, and the only point, before the court, was, as to the sufficiency of the proof of his hand-writing. The rule, for which we contend, is a security against frauds, and the inconvenience is too inconsiderable to form an objection against it.

2. The receipt of the collector ought to have been proved, or authenticated; and it may be a question, whether that receipt discharged the bond, or would be a sufficient defence to a suit brought by the *United States*.

3. The plaintiff did not execute the bond on the credit of the defendant, but that of *Parker*. He knew that *Parker* was the owner of the goods. In the case of *Tom v. Goodrich*, there was no other evidence than the bond itself. In the case of *Taylor v. Mills and Magnall*, (*Cowp.* 525.) other evidence was admitted, and *Magnall*, though not a party to the bond

was held responsible. The defendant appears in the character of supercargo or agent. In regard to the *United States*, as to the payment of the duties for the goods, he was principal; but not so in regard to the plaintiff, who knew *Parker*, and the relation in which the defendant stood towards him, as the owner of the goods. The plaintiff and the defendant were, in fact, sureties for *Parker*; and one surety cannot maintain an action at law against his co-surety, for the money he has paid. The account produced by the plaintiff states *Parker* as the principal, and the defendant as agent. The whole of the proceeds of the cargo were received by the plaintiff, and passed to the credit of *Parker*. The evidence is conclusive that *Parker* was the principal in this transaction, and so considered by the plaintiff.

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*4. It is true, a very slight acknowledgment will take a debt out of the statute, but there must be satisfactory evidence of the existence of the original debt. The defendant expressed his surprise at the demand. He said that the plaintiff must be paid. This would be sufficient, if there was not another person who ought to pay, or if there was clearly an original debt of the defendant.

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YATES, J., delivered the opinion of the court. 1. It appears to be a settled principle, and not contested by the counsel on the part of the defendant, that when the witnesses to an instrument are dead, their hand-writing may be proved. I cannot discover the distinction between such a case, and the one now before us. The witness is without the jurisdiction of the court, and absent in foreign parts, so that it is not in the power of the party to procure his attendance.

The cases adduced do not establish a contrary doctrine. At most, it appears, that no fixed rule, for some time, existed on this subject in *England*. The argument that frauds may be practised, applies, with greater force, where the witnesses are dead. In cases like the present, a better opportunity for detection is afforded. The witness might afterwards return, and the whole transaction be more readily brought home to the party guilty of the fraud. I think the case of *Mott v. Dougherty*, (1 *Johns. Cases*, 230.) establishes the law on this subject. The proof of the hand-writing of a deceased witness was deemed sufficient; and on that occasion the court say, that the cases in support of the rule are reasonable; that some relate to absent witnesses; but the principle, in all, is the same. The proof, therefore, in this cause, of the hand-writing of the subscribing witness, absent in foreign parts, without proving the obligor's hand-writing, was sufficient.

*2. The possession of the bond, together with the collector's receipt, I think, is competent evidence of the payment of the money. No reasonable account can be given, how the

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plaintiff obtained the possession of it, without the previous fact of payment; and connecting with it the circumstance that the collector would be liable on this receipt, for the amount, to the *United States*, it must be deemed sufficient, at least in the first instance.

The next point is, that the plaintiff became surety on the credit of *Daniel Parker*, and not of the defendant.

No right existed in the plaintiff to charge *Daniel Parker* with the amount of the duties. It appears by the bond, that the plaintiff became surety for the defendant; and a subsequent assumption by *Parker* to pay the amount does not appear. If such an arrangement had been actually made, or the amount had been paid by him to the plaintiff, this would have destroyed the defendant's liability, and he might have availed himself of it, in his defence. The decision of this court, in the case of *Tom v. Goodrich*, (2 *Johns. Rep.* 213.) settles this point. *Barber*, one of the partners, executed bonds to the *United States*, for duties on goods imported, on account of the copartnership, and as their property, and *Tom* became surety in the bond. The court established this principle; that the claim of the *United States* against the copartnership became extinguished by the bond of the individual partner, who was alone responsible, and that the surety, who had paid the money, had a right of action against the partner only who had signed the bond.

4. As to the objection, that the evidence of the acknowledgment of the debt was not sufficient to take it out of the statute of limitations:

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*It is now generally received as law, that if a party acknowledges a debt to be unpaid, it is such a waiver of the protection of the statute as to repel the presumption of payment, being a recognition of the former liability. In the case of *Heyling v. Hastings*, (1 *Salk.* 29.) the defendant denied that he bought the goods, but said, "Prove it, and I will pay you." This conditional promise was deemed sufficient to take it out of the statute. In the present case, the defendant said the debt ought to be paid, and mentioned eighteen months as the time he wanted for payment. This is a promise, sufficient to make him liable. The declaration that he would overlook the papers, and that it was a transaction of a long standing, does not alter the case.

The court are of opinion, that the motion for a new trial must be refused.

Rule refused.

ALBANY,
August, 1809.RAWSON
v.
TURNER.RAWSON *against* TURNER, Sheriff of *Rensselaer*.

THIS was an action of debt. The declaration stated that, in *April* term, 1798, the plaintiff recovered a judgment, in this court, against *Isaac Bull*, for 458 dollars and 2 cents, which judgment is still in force, &c. ; that on the 11th *May*, 1798, the plaintiff sued out a *ca. sa.* on the said judgment, returnable before the said justices *of the said court, at, &c., on the last *Tuesday* of *July* next ; which was, on the same day, delivered to *James Dole*, then the sheriff of the county of *Rensselaer*, to be executed ; that *Dole*, on the same day, arrested *Bull*, and kept him in his custody ; and *Bull* was kept in custody, in execution of the said judgment, until the defendant, on the 25th *April*, 1809, he then being sheriff of the county of *Rensselaer*, suffered him to escape, &c., whereby an action hath accrued, &c.

The defendant pleaded the general issue, with a notice of all the facts afterwards offered in evidence at the trial.

The cause was tried at the *Albany* circuit, in *October*, 1808, before Mr. Justice *Spencer*.

The plaintiff proved the record of the judgment, and offered the *ca. sa.* in evidence ; and proved that *Bull*, the prisoner, was duly assigned, with the gaol, by *Dole*, on the 20th *November*, 1800, to *Moses Vail*, then sheriff, and by *Vail*, on the 1st *February*, 1801, to *Michael Henry*, his successor in office, and by *Henry*, in *March*, 1807, to *Levinus Lansing*, his successor, and by *Lansing* to the defendant, on the 26th *February*, 1808 ; that, on the day charged in the declaration, *Bull* was at large, and out of the limits of the gaol of *Rensselaer* county ; and that, at the time of the last assignment of the prisoners, *Bull* was present, and shown to the defendant, as one of the prisoners assigned. This evidence was objected to by the defendant's counsel, on the ground that it was not averred in the plaintiff's declaration that *Bull* was ever in the custody of the defendant :

If a new sheriff receives a prisoner from his predecessor, he is answerable for his escape, though a volun-

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tary escape may have existed in the time of his predecessor ; but the plaintiff has his election, either to consider the prisoner in execution, and so charge the new sheriff for the last escape, or as out of execution, and charge the old sheriff. If he has once made his election, and sued the old sheriff, and recovered judgment against him, it is conclusive, and a bar to any action against the new sheriff. (a)

(a) See *Littlefield v. Brown*, 1 *Wend. Rep.* 404. *McElroy v. Mancius*, 13 *Johns. Rep.* 121.

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but the objection was overruled by the judge, and the evidence admitted.

The defendant then gave in evidence the record of a judgment, recovered in *April*, 1802, by *Dole*, against *Bull* and one *Potter*, on a bond given to *Dole*, as sheriff, for the gaol liberties, granted to *Bull*, and that the recovery was for nominal damages only.

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*The defendant also gave in evidence the record of a judgment, recovered by the plaintiff, in *August* term, 1806, against *Dole*, as sheriff, for the escape of *Bull*, on the *ca. sa.* above-mentioned, for the sum of 458 dollars and 2 cents.

The defendant then offered to prove that *Dole* voluntarily permitted *Bull* to escape. This was objected to, but admitted by the judge.

By consent, *Bull* was sworn as a witness, and testified, that about a year after he was taken into custody, *Dole* permitted him to escape, and repeatedly told him that he might go about his business, and that he did not want him any longer; that in consequence of such permission, he went home, and staid two weeks, when he was retaken by *Dole*, and kept in close confinement, where he remained for a year and a half; that he had never given bail or security to the sheriff, and that, while *Lansing* was sheriff, he frequently went at large, with his knowledge.

It was admitted, that in the suit brought by *Rawson* against *Dole*, the plaintiff recovered for a negligent escape only.

Dole, who was called as a witness, testified, that he had no recollection of ever giving such a permission to *Bull*, and was confident that he did not, otherwise he should not have retaken him; that *Bull*, while in custody, was very troublesome, and he might have told him to go about his business.

The judge charged the jury, that if they believed *Bull*, they ought to find for the defendant; that, as he swore positively, and *Dole* merely that he did not recollect giving the permission, they ought to believe *Bull*, in preference, so as to avoid the imputation of perjury.

The jury found a verdict for the defendant.

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*A motion was made to set aside the verdict, and for a new trial.

Foot, for the plaintiff. The evidence of *Bull*, that *Dole* permitted him to escape, ought not to have been admitted.

After the assignment by *Dole* to *Vail*, and by *Vail* to the defendant, the latter was estopped from saying that *Bull* was not his prisoner. The defendant, having received *Bull* as a prisoner, and having been assigned to him as such, is estopped from alleging to the contrary. (4 *Com. Dig.* 76. *Cro. Eliz.* 756. *Dyer*, 196.)

After *Dole* had permitted *Bull* to escape, a new execution might have issued, under the statute; but this was unnecessary

after the recaption and subsequent acquiescence by *Bull*, who must be bound by such acquiescence; for he was present when the prisoners were assigned, and submitted to the assignment.

Again, the judge misdirected the jury. *Dole* said that he was confident he did not give permission to *Bull* to go at large. The testimony of the two witnesses was balanced, and it ought to have been left to the jury to believe the one whom they thought most credible. *Dole's* evidence was corroborated by the fact of *Bull's* continuing in custody.

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Russell, contra. 1. The *ca. sa.* on which *Bull* was arrested was void. It was issued subsequent to the act of 1799, (*Greenleaf's ed. of Laws*, vol. 3, p. 61. *Drake v. Miller*, *Cole. Cas.* 89.) altering the form of the return of writs, and directing them to be made returnable "before our justices of our Supreme Court," &c. If the writ was void, it may be taken advantage of by the defendant; and a sheriff is not liable, where the process is absolutely void. (*Cro. Eliz.* 165. *Cro. Jac.* 3. *note.* 2 *Salk.* 700.)

2. There was no averment in the declaration, that *Bull* was ever in the custody of the defendant. Every material fact which is to be proved, must be averred in the declaration. It was not competent, therefore, to prove that fact. (2 *Str.* 1226. 3 *Bos. & Pul.* 456.)

3. A prisoner must be legally in the custody of the sheriff, to make him responsible for an escape. (2 *Bac. Abr.* 516. *Escape.*) It was competent to the defendant to show that *Dole* had voluntarily suffered *Bull* to escape, and afterwards retaken him, which he could not lawfully do, nor could *Bull* be held in custody, after the voluntary escape.

4. *Dole* having become liable to an action for the escape, and as the plaintiff has elected to bring his action against him, for the escape, and has recovered judgment, he must be considered as having waived any other remedy. He ought not to be allowed to bring another action, against a subsequent sheriff.

The plaintiff may bring an action against the sheriff for the escape, or retake the prisoner; he cannot do both. (2 *Wils.* 295.)

VAN NESS, J., delivered the opinion of the court. If a new sheriff regularly receives a prisoner from his predecessor, he is bound to detain him, and is answerable for his escape, although a voluntary escape may have existed in the time of his predecessor. The cases of *Lenthal v. Lenthal*, (2 *Lev.* 109.) of *James v. Pierce*, (2 *Lev.* 132. and 1 *Ventris*, 269.) and of *Grant v. Louthers*, (6 *Mod.* 133.) have so fully established this rule of law, that on this ground, if no other difficulty intervened, the plaintiff would be entitled to a new trial.

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But it appears that the plaintiff elected to prosecute *Dole*, the former sheriff, to judgment, for the escape in his time; and a question arises, whether this does not bar the plaintiff of all right of action against the present sheriff, for the escape of the prisoner, since he was committed to his custody. In the case of *James v. Pierce*, *the court held, "that, notwithstanding the first voluntary escape, when the prisoner was in prison again, he was so far in custody, that the plaintiff had an election, either to take him as now in execution, and so charge the new warden for the last escape, or to admit him out of execution, and charge the old warden." The plaintiff here, then, had his election, either to consider the prisoner, after his recaption, as in the custody of *Dole*, or not; and it becomes necessary to decide whether the plaintiff has made his election, and if he has, then what is the effect of it.

The case states, that after the escape, in the time of *Dole*, in 1806, the plaintiff, so far from affirming *Bull* to be in *Dole's* custody, charged *Dole* with the escape, and obtained judgment against him, for the whole amount of his debt. This appears to me to be a sufficient determination of the plaintiff's election, not to consider *Bull* in *Dole's* custody; and the prosecuting *Dole* to judgment determines the election finally and irrevocably. Thus, "if A. grant to B. for life, an annuity, or a robe at the feast of *Easter*, and both are behind, the grantee ought to bring his writ of annuity, in the disjunctive, for if the grantee bring his writ of annuity for the one only, and recover, the judgment," says Lord *Coke*, "shall determine his election for ever. Again, if the grantee bring a writ of annuity, and after the return thereof doth appear and count, this is a determination of his election in a writ of record; albeit, he never proceedeth any further." (See Sir *Rowland Heyward's* case, 2 Co. Rep. 36.

The plaintiff having made his election, he is concluded by it. This is reasonable. He ought not to be allowed to proceed against the sheriff for the escape, and at the same time hold the prisoner in execution. It is true, there are cases where the party has concurrent remedies for the same cause of action, against several persons. *Such, for instance, are suits by the holder against the drawer and endorsers of a bill of exchange, against the maker and endorsers of a promissory note, against several obligors in the same bond, against trespassers, severally, for the same trespass. In these instances, the proceedings may be carried on to judgment, though the plaintiff is limited to a single satisfaction. It will be observed, that in the cases which I have enumerated, the cause of action is the same, that it accrues against all, at the same time, and that the concurrent remedies are perfectly consistent and compatible with each other, and this distinguishes them from the present case. The plaintiff here might have considered *Bull* as being in *Dole's*

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custody, or not, at his election. The right of election has been exercised, by the suit commenced, and the judgment recovered against *Dole*. *Bull*, therefore, in judgment of law, could not be considered as in *Dole's* custody, upon the plaintiff's execution after the first escape, and he, of course, was never legally in the custody of *Dole's* successors. The plaintiff elected to disaffirm the recaption and subsequent imprisonment of *Bull*; and hence, it is evident, that to give him a remedy against the present sheriff, is inconsistent and incompatible with the former remedy actually pursued against *Dole*. This point goes to the merits of the cause; and being of opinion that the plaintiff cannot waive the election which he has once made, and, of course, that he can never recover against the present sheriff, it is unnecessary to consider the other questions submitted in the argument.

Motion denied.

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August, 1809.

ROBBINS
v.
BINGHAM

*ROBBINS *against* BINGHAM.

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THIS was an action of *assumpsit*. The declaration stated, that the defendant, in consideration that the plaintiff, at the special instance and request of the defendant, would credit one *Heman Dickenson*, goods, &c. to the amount of 800 dollars, the defendant would be security for the payment, &c., and averred that the plaintiff did deliver to *Dickenson*, goods, to the value of 900 dollars, &c. Plea, *non assumpsit*. At the last *Rensselaer* circuit, by agreement of both parties, the cause was referred to three referees, and if any questions of law should arise before the referees, they were to be referred to one of the judges of this court.

The parties, afterwards, agreed that the evidence submitted to the referees, and the law arising thereon, should be stated in the form of a case, and submitted to the decision of this court, and that judgment should be entered thereon, according to the opinion of the court, in the same manner as if there had been a verdict in the case.

Where A. gave a letter of credit to B. for goods to the amount of 800 dollars, addressed to C., who delivered to B. a part of the goods, and the residue was delivered to him by D. and E., on the same letter of credit; in an action brought by C. against A., for the whole, it was held, that he was responsible only for the goods delivered by C., such a letter of credit not being assignable. (a)

(a) *Penoyer v. Watson*, 16 *Johns. Rep.* 100.

ALBANY,
August, 1808.

ROBBINS
v.
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The plaintiff produced before the referees, a letter of credit, from the defendant, directed to the plaintiff, as follows: "*Fairfield, October 2, 1804. Sir, if you will credit Heman Dickenson goods, to the amount of 800 dollars, I will be his security, that he shall pay you according to the contract. Solomon Bingham, jun.*" On the back of the letter of credit, was endorsed by *Dickenson*, as follows, to wit: "Received, the 15th and 16th *October, 1804*, on account of the within letter of credit, or recommendation, the following sums of money, in goods, to wit, of *John Robbins*, the sum of 293 dollars and 22 cents; of *Gersham Richards and Sons*, the sum of 237 dollars and 62 cents; and of *Russel and Tracy & Co.* the sum of 55 dollars and 89 cents, amounting in the whole to 586 dollars and 63 cents."

It appeared that the goods mentioned as received from the plaintiff, were delivered by his clerk to *Dickenson*, and not having goods which suited, to the full amount of the letter of credit, he went with *Dickenson* and the letter of credit to the other persons, and offered them the benefit of the letter of credit for the residue, saying, that the defendant was a good man for the amount; that the other persons let *Dickenson* have goods to the amount, specified in the endorsement, and which were charged to *Dickenson* in their books. It appeared also, that the plaintiff had been paid for the amount of the goods delivered by him to *Dickenson*. The referees reported in favor of the plaintiff for 377 dollars and 28 cents, including goods delivered by *Richards and Son*, and *Tracy & Co.* as endorsed on the letter of credit.

Van Vechten, for the defendant, moved to set aside the report of the referees.

Foot, contra.

Per Curiam. The interest of the plaintiff, in the letter of credit, was not an assignable interest; it was not a general letter of credit, but addressed to a particular person. The defendant was responsible to the plaintiff only for the goods delivered by him, and not for the goods delivered by others. The report of the referees must be set aside.

Rule granted.

ALBANY,
August, 1809.
LIVINGSTON
V.
BARTLES.

*LIVINGSTON against BARTLES, Manucaptor, &c.

A MOTION was made on the part of the defendant, as bail of *William Kersey*, for leave to surrender his principal, and that an *exoneretur* be entered on the bail-piece.

The defendant stated in his affidavit, that he resided in *Steuben* county, and that the writ in the original cause was returnable in *July* term, 1800, and that a short time thereafter he became bail, and the bail-piece was filed in the clerk's office at *Albany*. The principal then resided in *Steuben* county, and continued to reside there, until *December*, 1803, when he removed into *Pennsylvania*, where he now resides, about 270 miles from his former residence in *Steuben*. The principal, for some time before his removal, was confined in the gaol of *Steuben* county, and was reputed insolvent. From that fact, and the omission of the plaintiff to charge the principal in execution, the bail supposed that the plaintiff had abandoned all expectation of obtaining any part of his judgment, until a few days before *May* term last, when a writ was served on the bail, returnable the first day of last term. The defendant, from ignorance, supposed that he had time, until this term, to surrender his principal; he went twice to *Bath*, to obtain advice of counsel, and was informed he must surrender the principal, and that it could not be done without a certified *copy of the bail-piece; and on the 12th of *May*, he sent to *Albany* for a copy of it.

The defendant in the original suit stated, by affidavit, that he was sued in 1800, on a promissory note, and the present defendant became special bail for him; that he made no defence, and that judgment was not docketed until *August*, 1808; that the bail was arrested the 29th of *March* last. On hearing of it, he immediately came to *Steuben* county, from *Pennsylvania*, and arrived on the 9th of *May*, in order to surrender himself; that no legal surrender could be made, for want of a certified copy of the bail-piece; that he, thereupon, went to the city of *New-York*, and arrived on the 26th of *May*, and on the 27th of *May* offered to the plaintiff's attorney, to surrender himself immediately to the sheriff of *New-York*, which offer the attorney refused to accept; that he is 64 years old, and infirm; that he was advised to apply to the court, and has come to *Albany*, for leave to surrender, and arrived here the 31st of *July* last.

rendered, and as no surrender could then be made, for want of a certified copy of the bail-piece, he proceeded to *New-York*, where he arrived on the 29th *May*, and on the next day, offered the plaintiff to surrender himself into the custody of the sheriff of *New-York*. The clerk, at *Albany*, could not find the bail-piece, and he did not obtain a copy of it from the clerk of *New-York*, in whose office it was filed, until the 3d *July*, and it was sent by mail to the bail, in *Steuben* county. It was held, that the bail having been lulled into security by the plaintiff, and taken by surprise, he ought, under the circumstances of the case, to be allowed to surrender at this term.

B. became bail for A., who was arrested in *July*, 1800, and then resided in *Steuben* county. A. made no defence, and a rule for judgment by default was entered, but no judgment was docketed until *August*, 1808. In *December*, 1803, A., who had been for some time confined in gaol, and was reputed insolvent, removed into *Pennsylvania* where he has since resided, at the distance of 270 miles from *Steuben* county. On the 29th *March* last, B., as bail, was arrested on

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a writ returnable on the first day of *May* term last, which was the first intimation the bail had of the proceedings of the plaintiff on the judgment, supposing that he had abandoned all expectation of recovering his debt. The bail applied to counsel for advice. He sent to *Albany*, on the 12th *May*, to obtain a copy of the bail-piece. The principal came to *Steuben* county, on the 9th *May*, in order to be sur-

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Peter D. Beekman stated, by affidavit, that on the 19th of *May*, he received, by letter, an order from *Steuben* county, for a copy of the bail-piece; that he made search, and could not find it; and on the 3d *July* last, received a copy of it from the clerk's office in *New-York*, and delivered it to the attorney of the defendant, who swore, that he sent it by mail to *Steuben* county, where he supposed the surrender might have been made in season, but the delay must have been owing to the miscarriage of the letter, enclosing the bail-piece.

An order to stay proceedings was obtained on the 22d day of *May* last, which was served on the plaintiff's attorney, the 2d of *June*, who had previously filed a declaration in this cause.

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**KENT*, Ch. J., delivered the opinion of the court. The conduct of the plaintiff has been calculated to lull the bail to sleep, and it would be unjust for him now to take and hold the bail by surprise. It would have the appearance of a fraud practised upon the bail. The prominent facts in the case are peculiar. The principal was sued in 1800, upon a promissory note, and he made no defence. At that time, and for some years after, he resided in *Steuben* county, and was for a considerable time in gaol, and reputed insolvent; and from these facts, and the omission of the plaintiff to proceed in the suit, the bail supposed that the plaintiff had abandoned all expectation of recovering his debt; and that this supposition was correct, appears from the fact, that the plaintiff did not docket his judgment, until *August*, 1808, and not until long after the principal had removed to the interior of *Pennsylvania*, 270 miles from his former residence. Under these circumstances, the bail must have been completely surprised, when he was arrested a few days before the return of the writ, at the last term, and as all reasonable diligence has since been used by the bail and his principal to effect a surrender, it is right that the rule, *ex gratia*, should be extended beyond eight days after the return of the writ. I place our interference in favor of the bail, upon the ground, that the plaintiff has himself prevented a surrender long ago, by throwing the bail off his guard; and he ought not, and shall not now be permitted to avail himself of his own gross negligence or fraudulent contrivance, in order to fix the bail. The case of *Aylett v. Hartford and Richards*, (2 Bl. Rep. 1317.) and which is mentioned by Lord Commissioner *Wilson*, in the case *ex parte Wright*, (2 Ves. jun. 9.) is very much to our present purpose. In that case, a defendant was sued, and bail put in before bankruptcy. Afterwards, the defendant became a bankrupt, and the debt was proved, and the creditor acted *under the commission. The bail omitted to surrender the principal, because, as the creditor was proceeding in another way, they thought they had no occasion to look after him, and then the principal ran away. When the creditor, afterwards,

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proceeded to charge the bail, the Court of C. B. would not allow the plaintiff to proceed, because he had lulled the bail asleep. The bail do not ask so much in the present case. The principal is here ready to be surrendered, and so he has been, since nearly the close of the last term; and the bail only ask for leave to surrender.

ALBANY,
August, 1869.

MINOR
V.
GARRISON.

Rule granted, on payment of costs
of the suit on recognizance.

MINOR *against* GARRISON and BAKER.

W. WOOD, for the defendants, moved to change the *venue* from *Albany* to the county of *Cayuga*. He read an affidavit, stating that the cause of action arose in the county of *Cayuga*, and was founded on a special contract; that they had a good and substantial defence, and that "all their witnesses, of which they had several," resided in the county of *Cayuga*.

On a motion to change the *venue*, on account of material witnesses residing in another county, the defendant ought to state the number of the witnesses, otherwise, the court cannot intend that he has more than one.
(a)

Sedgwick, contra, read the affidavit of the plaintiff, that he had "a material witness in the cause, who resided in the county of *Albany*."

Per Curiam. The defendants, in their affidavit, do not mention the number of their witnesses, nor whether they are material. The court cannot intend more than *one; and the plaintiff swears that he has also a material witness residing in *Albany*. There is no preponderance in favor of the defendants, to induce the court to change the *venue*. They ought to have stated the number of witnesses, to enable the court to judge of the expediency of granting the motion.

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Motion denied. (b)

(a) 2 Rev. Stat. 409.

(b) The statute (2 Rev. Stat. p. 409. s. 1 & 2.) provides, that all issues of fact joined in the Supreme Court, or joined in the Court of Chancery, or in any surrogate's court, and sent to the Supreme Court for trial, shall be tried in the proper county as follows:—

1. Actions for the recovery of any real estate, or for the recovery of possession of real estate, actions for trespass on land, and actions for trespass on the case for injuries to real estate, shall be tried in the county where the subject of the action shall be situated.

2. Actions of trespass for injuries to the person, and actions on the case for injuries to the person or personal property, shall be tried in the county where the cause of action arose.

3. All actions of slander, for libels, and all other actions for wrongs, and upon contracts, shall be tried in the county where the *venue* shall be laid, unless the court shall deem it necessary for the convenience of parties and their witnesses,

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or for the purposes of a fair and impartial trial, to order such issues to be tried in some other county, in which case the same shall be tried in the county so designated. And the court shall have power to change the venue in any of the actions specified in this section, (s. 2.) when it shall appear that a fair and impartial trial cannot be had in the county in which such venue is laid.

The court no longer adhere to the distinction formerly made between actions *ex contractu* and actions *ex delicto*, (see *Durges v. Orcott*, 9 *Johs.* 249.) but have ordered (Oct. term, 1827, Rule 1. 7 *Cow. Rep.* 763.) "that, in all transitory actions, motions to change the venue shall be determined according to the convenience of the witnesses, without any distinction between actions *ex contractu* and *ex delicto*." See also *Root v. King et al.* 4 *Cow. Rep.* 403. The venue will be changed when the circuit judge of the district, in which the county in which the venue is laid is situated, has been counsel for the plaintiff, previous to his appointment as judge. *Van Rensselaer v. Douglass*, 2 *Wend. Rep.* 290. But that a strong excitement prevails in the county to which application is made to change the venue, on the subject matter of the suit, is no ground for refusing to change the venue on the ordinary affidavit. *Bowman v. Ely*, 2 *Wend. Rep.* 250. Where a defendant applies to change the venue in a cause, after the same has been noticed for trial at the circuit in the county where the venue was laid by the plaintiff, and the trial put off on the application of the defendant, the motion will be granted on payment of the costs of the circuit, and of resisting the motion, and on the defendant's stipulating to take short notice of trial. *Carpenter v. Watsons*, 5 *Wend. Rep.* 102.

THOMAS against RUMSEY.

Where a representative in Congress is libeled in respect to his official conduct, a special jury may be awarded. (a)

J. RUSSELL, for the plaintiff, moved for a special jury in this cause. He read an affidavit, that the suit was brought against the defendant, "for publishing a false and scandalous libel, of and concerning the plaintiff's official conduct, as a representative in the Congress of the *United States*."

Foot, contra.

Per Curiam. It is not necessary that the plaintiff should be an officer, in the strict sense of the word. The act authorizes the court to direct a special jury, in cases which they may deem intricate and important. We consider, that where a person holds a place of high public trust and confidence, and is libeled in relation to his official capacity, it is a case of such importance, as the public have a deep interest in the character of its officers and magistrates, that we will grant a struck jury. It is on this principle, that the court have granted special juries, in actions where public officers were libeled. If the application was now to be made for the first time, we *might, perhaps, be induced to refuse it in cases of libel; but the rule is settled, and this case comes within the principle of former decisions. We are of opinion, that the motion ought to be granted.

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Rule granted.

(a) *Poucher v. Livingston*, 2 *Wend. Rep.* 296, and the cases there cited.

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August, 1809.KETCHAM
v.
CLARK.JACKSON, *ex dem.* STARR and Wife, *against* RICHMOND.

VAN BUREN, for the plaintiff, moved to amend the declaration in this cause, by inserting a demise from *Elisha Jenkins* and several others, who, he stated, in an affidavit, were necessary lessors, in order to support the plaintiff's title, as had been discovered since the commencement of the present suit. He cited 2 *Caines*, 260, 261.

In ejectment, a person who has no claim or any subsisting title to the premises in question, will not be allowed to be made a lessor (a)

E. Williams, contra, read an affidavit, stating that he had never understood, that the persons whom the plaintiff wished to be made lessors, claimed any estate or interest in the premises in question; that the present lessor claims the premises in question, in right of his wife, the only child and heir at law of her father, and against *Elisha Jenkins* and the others, named in the affidavit on the part of the plaintiff.

Per Curiam. The general rule is, that a person ought not to be made lessor, who has no claim or pretension to a subsisting title or interest in the premises. If any person, who may have once had a title, is to be made lessor, the burthen of deducing a title from him, is taken from the plaintiff, and thrown on the tenant, which ~~*would be unreasonable.~~ *Potior est conditio possidentis.* If there is a case that ought to be excepted from the general rule, it ought to be clearly and specially stated to the court. The motion must be denied.

[* 484]

Rule refused.

(a) See *Jackson v. Sclover*, 10 *Johns. Rep.* 368. *Scauber v. Jackson*, 2 *Wend. Rep.* 48. *Jackson v. Murray*, 1 *Cow. Rep.* 156. *Jackson v. Abby*, 6 *Cow. Rep.* 33. *Jackson v. Paul*, 2 *Cow. Rep.* 502. 1 *Cow. Rep.* 159.

KETCHAM and BLAKE *against* CLARK.

IN ERROR, from the Common Pleas of Ulster.

The writ of error in this cause was returnable on the first day of the present term. *Sudam*, attorney for the defendant in error, now moved, that all proceedings on the part of the

Where an insolvent had assigned over all his estate for the benefit of his creditors, and a judgment was recovered

in his name, in the Court of Common Pleas, on which a writ of error was brought, the assignees, for whose benefit the suit was prosecuted, were ordered to give security for the costs. (b)

(b) See *Waring v. Baret*, 2 *Cow. Rep.* 460. *Norton v. Rich*, 20 *Johns. Rep.* 47.

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plaintiff in error be stayed, until security for the costs shall be filed. He read an affidavit, stating that, at the trial before the court below, the demand of the plaintiffs was reduced by a set-off of the defendant, below the sum of 25 dollars, and a verdict found, on which judgment was entered; that the plaintiffs, having become insolvent, had assigned all their property to *I. and G. Ketcham*, to pay a debt due to them, and afterwards to the other creditors of the plaintiffs, for whose benefit the present suit was commenced; that the present plaintiffs are insolvent, and unable to pay the costs of the suit, should the judgment below be affirmed; and that the present suit is brought at the instance of their assignees, and without their knowledge.

Hawkins, contra.

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**Per Curiam.* It is just that the assignees should be responsible for the costs. The case of *Webb v. Ward* and another (7 Term Rep. 296.) is in point. Security must be given in the sum of 100 dollars.

Motion granted.

ROGERS against ROGERS.

Where an *ac etiam* clause, in *assumpsit*, was inserted in a *capias ad respondendum*, and the plaintiff afterwards declared in account, the proceedings were ordered to be set aside for irregularity. (a) Where the defendant is held to bail by an *ac etiam* clause, on a *capias*, the plaintiff is bound to pursue the nature of the action so stated in the writ.

THE defendant in this cause was arrested on a *capias ad respondendum*, containing an *ac etiam* clause, upon promises, for 500 dollars, returnable at the last term, and special bail was put in and perfected, in conformity to the writ. The plaintiff, afterwards, declared against the defendant in an action of account, and a rule to plead was entered thereon.

A motion was now made, in behalf of the defendant, to set aside the proceedings for irregularity.

Per Curiam. When the defendant is held to bail on a *capias*, (which presupposes an original bill,) by an *ac etiam* clause, the plaintiff is bound to pursue it, and declare accordingly. If the plaintiff, in such case, in his declaration, varies the nature

(a) *Durfee v. Heenstreet*, 1 Wend. Rep. 375. *Roosevelt v. Scoulden*, 16 Johns. Rep. 44.
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of the action, it is an irregularity, of which the defendant may take advantage, on motion. An *exoneretur* has often, in such cases, been ordered to be entered on the bail-piece. Relief, on motion, seems only to be denied, when such variance exists between the declaration and the original writ, where the suit is commenced by original. (*Cowp.* 455. 5 *Term Rep.* 402. 7 *Term Rep.* 80. 6 *Term Rep.* 364. 2 *Wils.* *394. 1 *Tidd's Prac.* 404.) The defendant here asks generally to have the proceedings set aside for irregularity, and as the rule to plead upon the declaration filed was irregular, it must be set aside with costs.

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v.
FULLER.

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Motion granted.(a)

(a) "Upon common process, by bill in the king's bench, or upon a *capias* or original *quare clausum fregit* in the common pleas, the plaintiff may declare in any cause of action whatever, though the writ in each case is in trespass. But in bailable actions, the declaration must correspond with the cause and the form of action in the affidavit, and the *ac etiam* part of the latitat, or other process, for otherwise the defendant will be discharged out of custody, on filing common bail; but this will be the only consequence, for the court will not in such case set aside the proceedings for irregularity." 1 *Chitty Pleas.* 254. where the cases above referred to, in the opinion of the court, are cited.

BENNET against FULLER.

A MOTION was made in behalf of the defendant, to set aside the proceedings in this cause, for irregularity, on an affidavit, that the defendant was never arrested. The plaintiff was a deputy of the sheriff of the county of Delaware. In his affidavit, he swore that he did arrest the defendant, and explained to him the nature of the writ; that he served the writ himself, as a deputy-sheriff, but did not require any bail.

An interlocutory judgment, for want of plea, was entered for the plaintiff, and a writ of inquiry of damages executed.

Per Curiam. The question is, whether there has been a legal service of this writ. It appears, from some of the cases, (*Cro. Car.* 416. 19 *Viner*, 443. note. *Moore*, 547.) to be a doubtful question, whether a sheriff can legally serve a writ where he is the plaintiff. In the present case, the writ was served by a deputy. No bail was required, and the sheriff returned the writ, and is responsible. As the practice of deputing the plaintiff to serve his own writ has been of long duration, we think it would be going too far to say, that the plaintiff cannot, in any cause, serve a writ in his own favor. A declaration in ejectment is always served by the party; and where the writ is served without exacting bail, there can be no oppression, and it is analogous to the service of a declaration in

It seems, that a sheriff, who is plaintiff, may serve his own writ. (See *Tuttle v. Hunt*, 2 *Cow. Rep.* 436. *Putnam v. Mann*, 3 *Wend. Rep.* 202.) But where the defendant was under a mistake as to the arrest, the court set aside a default entered for want of a plea, on an affidavit of merits.

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TUCKER.

ejection. As the defendant, however, appears to have been mistaken as to the service, and swears to merits, he ought to be let in to plead, on payment of costs. (Vide *Davenport v. Ferris*, 6 *Johas. Rep.* 131.)

VAN NESS, J., dissented.

Rule granted.

DANA against TUCKER.

The affidavits of jurors cannot be received to impeach or alter their verdict; but they may be received to exculpate the jurors, or in support of their verdict.

THIS was an action for a *breach of promise of marriage*, tried at the last *Madison* circuit, when the jury found a verdict for the plaintiff, for 439 dollars and 58 cents.

Gold now moved to set aside the verdict, for the misbehavior of the jury. He read the affidavit of the constable, who was sworn to attend the jury, while they retired to deliberate on their verdict, who stated, that the jurors agreed, that each of them should mark down such sum as he thought fit to find, and the sum total being divided by twelve, the quotient should be the verdict; and that the verdict was so ascertained.

Similar affidavits of two of the jurors were also read.

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N. Williams, contra, read the affidavits of two other jurors, stating, that the jury, after some deliberation, unanimously agreed to find a verdict for the plaintiff; *that each juror then privately marked the sum he was inclined to give; eight of them marked 500 dollars, one 600 dollars, and one 50 dollars. The sums so marked were added together, and the amount divided by twelve, and the sum produced by the division, they, afterwards, agreed should be their verdict. After the verdict was delivered in court, in the usual form, the jury were polled, and each of the jurors, on being asked whether he agreed to the verdict, declared his assent.

Gold objected, that these affidavits of the jurors could not be read. He cited the case of *Owen* and another v. *Warburton*, (1 *Bos. & Pull. N. S.* 326.)

Williams observed, that in the case of *Smith v. Cheetham*, (3 *Caines*, 57.) the court allowed the affidavits of jurors to be read; and that it would be unreasonable and unjust, to permit the solemn verdict of a jury to be set aside on the affidavit of an officer as to their misconduct, without allowing the jurors to be heard in defence of their verdict. In the case of *Lawrence v. Boswell*, (*Sayer*, 100.) where seven of the jurors voted for 394

the verdict, and the other five made no objection, when the verdict was given, the court refused to set it aside.

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Per Curiam. The better opinion is, and such is the rule adopted by the court, that the affidavits of jurors are not to be received to impeach a verdict; but they may be admitted in exculpation of the jurors, and in support of their verdict. Rejecting the affidavits of the two jurors against the verdict, there is the affidavit of two other jurors in favor of the verdict, which must outweigh that of the constable. If the jurors previously agree to a particular mode of arriving at a verdict, and to abide by the contingent result at all events, without reserving to themselves the liberty of dissenting, such a *proceeding would be improper; but if the means is adopted merely for the sake of arriving at a reasonable measure of damages, without binding the jurors by the result, it is no objection to the verdict. Such appears to have been the case here; and after the result of the division was known, they individually assented to the sum as their verdict. The motion must be denied.

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Rule refused.

JACKSON, *ex dem.* MENTZ and MENTZ, against
STILES.

HAMILTON moved that the default entered in this cause should be set aside, and *O'Neal*, the tenant in possession, be admitted as defendant in the place of the casual ejector.

The declaration in this cause, with the notice, was served on *O'Neal* the *Wednesday* preceding the last *May* term, who, during the same week, employed an attorney to defend the cause. On the 2d *July* last, the attorney of *O'Neal* sent to the attorney of the plaintiff, a notice of his being employed to defend the suit, and, at the same time, during the same month, sent copies of the consent rule and plea, which were not received until after a default was entered, and were, therefore, refused.

In an action of ejectment, where the tenant swears to merits, and no trial has been lost, a regular default will be set aside to let in the tenant to defend his possession.

The attorney of *O'Neal*, in his affidavit, stated that he did not obtain the declaration which had been served, until some

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time in *July*, and that, by the next post, he sent the consent rules and plea to the plaintiff's attorney, who lives fifty miles from him, and that until he saw the declaration, he did not know who the fictitious parties *were; and that he was not informed until the 9th *August*, that the default had been entered, when he offered to pay all the costs, if the plaintiff's attorney would waive the default; and accept a plea, which he refused to do. The tenant also swore that he had a good and substantial defence on the merits.

Hawkins, contra, cited *Col. Cases*, 90. 1 *Caines*, 155. 3 *Caines*, 107.

Per Curiam. The excuse given by the attorney of the defendant, for not entering into the consent rule in season, is frivolous and inadmissible. But here the tenant swears to merits; and as no trial has been lost, we will not let the possession be changed, in an action of ejectment, without an opportunity to the tenant to defend it. It was said, in the case of *Jackson, ex dem. Rosekrans, v. Stiles*, (1 *Caines*, 503.) that the court would set aside a default, to protect the possession of the tenant, in an action of ejectment, when they would not do it in any other action. We, therefore, grant the motion, on payment of costs, and on the tenant's entering into the consent rule, and pleading within 10 days, so that the cause may be tried at the ensuing circuit in *Ulster*.

Rule granted.

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*THOMAS against CROSWELL.

A special jury will not be granted, in an action for a libel against a person who is a public officer, unless the libel relates to his official conduct.
(a)

J. RUSSELL, for the plaintiff, moved for a special jury in this cause. He read an affidavit, stating that the action is brought against the defendant, for publishing a false and scandalous libel, of and concerning the plaintiff; being one of the representatives of the state of *New-York*, in the Congress of the *United States*, and a major-general in the militia of the state.

Foot, contra

Per Curiam. In the cases of *Spencer v. Sampson*, and *Foot v. Crosswell*, (1 *Caines*, 498.) *Livingston v. Cheetham*, (1 *Johns. Rep.* 61.) and *Van Vechten v. Hopkins*, (2 *Johns. Rep.* 373.)

(a) See ante, *Thomas v. Rumsey*, 482.

the rule was settled, that unless it appears, that the plaintiff was libeled for his *official* conduct, in some important *public trust*, we will not grant a special jury. In the present case, though the plaintiff was, at the time, a representative in Congress, and major-general of the militia of the state, yet it does not appear that he was libeled for any conduct in either of those official characters.

The motion must, therefore, be denied.

Rule refused. (a)

(a) Vide *Genet v. Mitchell*, ante, 186.

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WORTHY
V.
GILBERT.

*WORTHY against GILBERT.

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N. WILLIAMS, for the defendant, moved to change the *venue* in this cause, from the county of *Albany* to the county of *Oneida*. He read an affidavit of the defendant, that the cause of action arose in the county of *Oneida*, &c., that he had a good and substantial defence on the merits, and that all his witnesses resided in the county of *Oneida*.

Where the plaintiff undertook to bear all the expenses of bringing the defendant's witnesses to the county where the *venue* is laid, the motion to change the *venue* was denied. On a motion to change the *venue*, no costs are allowed on either side. (a)

Gold, contra, objected that the affidavit was too vague; that it ought to mention the number of witnesses. The defendant swears that all his witnesses reside in the county of *Oneida*; but *non constat*, that he has one *material* witness in that county. Further, the defendant swears that he has a good defence, but not as he is advtd by counsel. He offered to bear all the expenses of producing the defendant's witnesses at the trial in *Albany*.

Per Curiam. On the stipulation of the plaintiff's attorney, to pay all the expenses of bringing the defendant's witnesses to *Albany*, we deny the motion to change the *venue*. From the general terms of the affidavit, we cannot infer that the defendant has more than one witness, residing in *Oneida* county; but it does not appear that the plaintiff has any witness in *Albany*. If the party himself will undertake to swear that he has a good defence on the merits, it is sufficient on a motion to change the *venue*.

Gold asked for costs, for opposing the motion, as it had been denied; but the court said, that on a motion to change the *venue*, no costs were to be allowed on either side.

Motion denied.

(a) *Harrower v. Betts*, 2 Cow. Rep. 496. *Budd v. Malburn*, 1 Cow. Rep. 47. See *Swartwout v. Hoag*, 16 Johns. Rep. 492.

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v.
STILES.

*JACKSON, *ex dem.* CANTINE and others, *against* STILES,
(GEORGE CLARK, tenant.)

JACKSON, *ex dem.* CANTINE and others, *against* STILES,
(BUEL, tenant.):

JACKSON, *ex dem.* VAN GORDEN, *against* STILES,
(HOLLENBECK, tenant.)

Friday, Aug.
18th.

After a judgment by default, against the casual ejector, in ejectment, the landlord may be let in, to appear and defend; and if he be an alien, he is, at the time when he is let in to defend, in season to petition for the removal of his cause into the court of the *United States*. Where actions of ejectment, after a judgment against the casual ejector, are removed into the Circuit Court of the *United States*, this court will order all further proceedings on such judgment to stay, until the further order of the court.

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SCOTT, for the defendants, moved to set aside the defaults entered in these three causes, and that *George Clark* be admitted to defend the two last causes, as landlord; and further, that all the causes be removed into the Circuit Court of the *United States*, to be held in the district of *New-York*.

It appeared from the petition and affidavit of *Clark*, that he was a *British* subject, and not a citizen of the *United States*; and that he was the landlord of the premises in question, which were above the value of 500 dollars; and that he had been in the actual receipt of the rents and profits.

The declaration in ejectment in the first cause, was served on the 13th *May* last, at *Catskill*, in the county of *Green*; and on the same day, *Clark* received notice of the service of the declaration, on the tenant, in the third cause; and on the 3d *August*, was informed of the service of the declaration on the tenant, in the second cause. It did not appear on what day the declarations, in the two last causes, were actually served, but it was prior to the 2d *Monday* of *May*, as the notice was to appear on that day. The premises in question are situated in *Catskill*. The defaults, in all the causes, were entered on the 19th *July* last, and rules for final judgment entered on the 11th *August*. The judgment rolls were signed and filed, on the 16th *August*.

**Van Buren* and *Foot*, contra. The notice of this application was served on *Thursday* evening, at 10 o'clock.

Per Curiam. That was sufficient notice.

Van Buren and *Foot*. The two last causes are not within the act of the *United States*, (1 Sess. 1 Cong. c. 20. s. 12. vol. 1. p. 56.) which speaks only of suits against aliens. These suits are against citizens, not aliens. *Clark* may, perhaps, be interested; but the nature of the tenancy is not stated, and it may be that the defendants are tenants for life. If so, they are parties in interest.

In the first cause, the affidavit is entitled in the cause of *Jackson, ex. dem. Cantine and others, v. John Stiles*. The name

of *Clark* does not appear. There is, therefore, no suit commenced against him.

Again, the application comes too late, after the judgment has been perfected.

The laws of the *United States*, also, direct, that the defendant shall, at the time of entering his appearance in the state court, file his petition for the removal of the cause.

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Henry, in reply. It was one object of the third article in the constitution of the *United States*, and the intention of Congress, in the judiciary act, to give to aliens a choice between the courts of the *United States* and the state courts. This right ought to be favored, and construed liberally.

The relation of landlord and tenant, between *Clark* and the tenants, is made out by the affidavits, and the landlord may defend with the tenant, if he appear, and without him, if he does not. (2 *Rev. Stat.* 342.) The court cannot deny him this right, secured to him by the statute. (11 Sess. c. 36. s. 30. 2 *Revised Stat.* pp. 341, 342. § 17.) If the tenant refuse to appear, the landlord has a right to appear *without him. The default of the tenant is equivalent to a refusal.

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If the landlord is admitted to defend, he cannot be said to appear until he is so admitted, and enters into the consent rule; so that *Clark*, if admitted, comes strictly within the letter of the law of the *United States*, as to the time of presenting his petition.

The notice of the ejectment was not received by *Clark*, until the 13th *May*, so that he is in time to apply at this court.

KENT, Ch. J. In an ejectment the landlord is entitled to be made defendant, after judgment has been entered against the tenant, who neglects or refuses to defend. (a) By the judgment of law, the tenants, in the two last causes, must be considered as neglecting to defend. When the landlord is admitted as a defendant, he then *appears*, and is, therefore, in season to petition the court, that his cause may be removed. In the first cause, the service of the notice of the declaration was so

(a) "Whenever any action [of ejectment] shall be brought against any tenant, to recover the land held by him, or the possession of such land, the landlord of any such tenant, and any person having any privy of estate or interest with such tenant, or such landlord, in the premises in question, or any part thereof, may be made defendant with such tenant, in case he shall appear; or may, at his election, appear without such tenant. And in the latter case, the court may order a stay of execution upon any judgment against the tenant in possession, until the further order of the court." 2 *Rev. Stat.* 341. s. 17. The practice is, to admit the landlord to defend, upon motion, founded on affidavits, for a rule for that purpose, which is uniformly on notice to the plaintiff. See 1 *Cow. Rep.* 134. 576. 5 *Cow. Rep.* 447. 6 *Cow. Rep.* 589. 594. 1 *Wend. Rep.* 103. 316. The affidavits upon which the motion for admission is founded, must show sufficiently that the relation of landlord and tenant subsists. *Jackson v. Stiles*, 6 *Cow. Rep.* 594.

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late, that he had not time to apply before this term. (1 *Caines*, 503.) He is, therefore, clearly in time to make the application. As defendant, then, in all the causes, *Clark* is entitled, being an alien, to remove them.

As to any difficulty which may occur, in regard to the two last causes, in consequence of judgments against the casual ejector, which, under our statute, are to remain, when a landlord is let in to defend, they arise from the fiction of the action of ejectment, which ought not to prejudice the right. The following rule must, therefore, be entered: "That *George Clark* be admitted to appear, and defend, as landlord, in the two last causes, and that the default, and subsequent proceedings in the first cause, be set aside, on payment of costs; and that as to the judgments against the casual ejector, in the two last causes, there be no further proceedings in this court, *until the further order of the court; and that the motion of the said *George Clark* to remove all the said causes into the Circuit Court of the *United States*, be granted."

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THOMPSON, J., VAN NESS, J., and YATES, J., concurred.

SPENCER, J. I concur in granting the rule in the first cause, but not in the others.

The constitution of the *United States* has secured to aliens, in certain cases, the right of insisting that a cause instituted in a state court, shall be tried in a court of the *United States*; and if *Clark* has brought himself within the provisions of the constitution, and the statute under it, this court would grant him the object of his application, without travelling out of the case, to look at the subject matter of the suits, and without regard to any decisions which may have been had upon that subject, in the courts of this state.

Mr. *Clark*, being landlord of the premises in the two other causes, appears in time to make his application. But a serious difficulty presents itself; for though we are bound to admit the landlord to defend, on the refusal or neglect of the tenant to appear, the judgment against the casual ejector is to stand, and a stay of execution is to be entered, until the right is tried. (*Rev. Laws*, v. 1. p. 146. 11 sess. c. 36. s. 30.) It will be found that by the *English* practice, under their statute, of which ours is a copy, in relation to the admission of landlords to defend, that where the landlord defends alone, instead of the tenant, judgment must be entered against the casual ejector; that the plaintiff, after having tried his cause against the landlord, and succeeded, may have the benefit of his verdict, and obtain possession under the judgment against the casual ejector, which, under such verdict, he could not. (*Run. 403. Barnes*, 179.) It is a settled rule, that in ejectment, the plaintiff must prove the defendant in possession of the premises, when the action was brought; *and if the rule be, as laid down

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in *Runnington*, that, upon a verdict against the landlord, the tenant cannot be dispossessed, how could the present lessors, should they prevail in the court of the *United States*, obtain the fruits of their verdict?

But even this difficulty must yield to the mandates of the constitution, if these cases come within it, and the act passed to carry into effect its provisions. There is nothing in the constitution or statute, taking away the jurisdiction of a state court; they have, undoubtedly, concurrent jurisdiction; and although, in cases where foreign subjects are parties, the courts of the *United States* have concurrent and appellate jurisdiction, the constitution (Art. 3. s. 2.) leaves it to Congress, in cases where the courts of the *United States* have appellate jurisdiction, to regulate the manner, and to adopt such exceptions as they see fit. The 12th section of the act to establish the judicial courts of the *United States*, provides, "that if a suit be commenced in any state, against any alien," then, &c., it may be removed, under certain exceptions and regulations, to the next Circuit Court, to be held in the district where the suit is pending. In this case, no suit has been commenced against Mr. *Clark*; it was technically against *John Stiles*, but substantially against the tenant in possession, and therefore, though the landlord may be permitted to defend here, he is not within the provision of the act, as no suit has been commenced against him. I am, for these reasons, for denying the application to remove the two last suits, but am for admitting him to defend, and ordering a stay of execution.

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Rule granted, *ut supra*.

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*GENERAL RULE.

August 18th, 1809.

Ordered, That all attorneys of this court, not residing in the village of *Utica*, in the county of *Oneida*, shall have an agent residing in the said village, who shall be an attorney of this court, or a deputy clerk in the clerk's office at *Utica*; and that, in every respect, not herein provided for, the provisions of the 8th rule of this court, of *January* term, 1799, shall apply to such agent: That this rule shall go into operation, from and after the first day of the next *November* term.

Ordered further, That the deputy clerks in the clerk's office in *Albany*, and in *New-York*, may also be appointed agents, under the rule aforesaid of *January* term, 1799.

END OF AUGUST TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court for the Trial of Impeachments

AND

THE CORRECTION OF ERRORS

OF THE

STATE OF NEW-YORK,

MARCH, 1806.

JAMES CHEETHAM, plaintiff in error, against THOMAS TILLOTSON, defendant in error.

THIS cause came before the court, on a writ of error, from the Supreme Court. The suit below was for a *libel*, in which the plaintiff in error suffered a judgment by default, on which damages were assessed by a jury, and *final judgment thereon entered in the Supreme Court, in *November* term, 1806. (See 2 *Johns. Rep.* 63.) Errors were assigned at the last session of this court, and there was a joinder in error.

The defendant in error, afterwards, moved in the court below, to amend the original record, and that court ordered the amendments to be made accordingly, on payment of costs. (See 3 *Johns. Rep.* 95. 99.)

Henry, for the defendant in error, now moved, that the transcript of the record in this court be sent back to the *Supreme Court* to be amended, so as to conform to the original record, as amended in that court. He said, that according to the prac-

After an assignment of errors and joinder thereon, this

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court will not send the transcript of the record back to the Supreme Court to be amended, by the record in that court, which had been amended by that court, since the joinder in error here. All defects, or errors properly amendable, may be amended in this court, who will disregard all defects

or errors in matters of form, which may be amended, or which are aided by the statute of *jeofails*. (a) If the party wishes to have the transcript amended, the proper course is, to allege diminution, and pray a *certiorari* to the court below; but after the defendant has pleaded in *nullo ei erratum*, he cannot allege diminution, for by his plea he admits the record to be perfect; so that, after a joinder in error, neither party can allege diminution, or pray a *certiorari*.

(a) *Colden v. Knickerbacker*, 2 *Cow. Rep.* 31. See 17 *Johns. Rep.* 725.

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tice of the Court of Exchequer Chamber in *England*, which this court followed, in cases not provided for by its own rules, this was the settled course of proceeding. He cited 2 *Strange*, 837. 2 *Ld. Raym.* 1570. As to the power of the court below to amend the record, in form as well as in substance, he cited *Yelv.* 164. *Cro. Jac.* 277. 429. 666. 628. 2 *Roll.* 471. *Chambers'* case. *Hardres*, 505. 2 *Lev.* 22. 1 *Salk.* 269, 270. 1 *Wils.* 337. 2 *Ld. Raym.* 1570. 5 *Burr.* 2730. *Doug.* 113. 3 *Term Rep.* 659, 749. 7 *Term Rep.* 470. 1 *H. Bl.* 238. 1 *Tidd*, 622. 1 *Bac. Abr.* (*Amend.*) 168.

Foot and Baldwin, contra. The Supreme Court can only amend the record in matters of form; and by the statute of *jeofails*, this court are not to regard mistakes in matters of form, when alleged for error. All or most of the cases cited, merely show that this court may bring up the amended record, by *certiorari*, when the propriety of the amendment may be judged of here, which is the regular and correct course of proceeding. If the amendments are merely *formal*, as has been said, there the *party will have the benefit of the statute, and there is no necessity of putting him to the delay and expense of sending the transcript to be amended in the court below. Again, there was a joinder in error, and the cause was set down for hearing, at the last term; and the party now comes too late to apply for leave to amend.

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In the case of *Tully v. Sparkes*, (2 *Ld. Raym.* 1570.) the amendment was made by virtue of the statute of 16 and 17 *Car. II.* c. 8. If the transcript is sent down to be amended in matters of form, how is this court to know, when it is returned, that it has not been amended in matters of substance?

Henry, in reply. The mode of sending down the transcript to be amended, has been substituted instead of the practice of alleging diminution, and awarding a *certiorari*; and it is the most correct and convenient course of proceeding. The transcript, when returned, will always show what amendments have been made. The Supreme Court have a sound discretion in regard to amendments. The cases cited show that they may amend both in form and substance. If they abuse this discretion, the judges may be impeached; but there is no power to prevent their exercising such discretion. The direction of the statute 17 and 18 *Car. II.* was merely in confirmation of a convenient rule of practice. It is cheaper and more expeditious to send down the transcript to be corrected, than to allege diminution, and award a *certiorari*.

THE CHANCELLOR. A motion has been made to send back the transcript of the record, returned, on the writ of error in this court, to the Supreme Court, to be amended, on a suggestion on 404

the part of the defendant, that *several of the matters assigned for error, have been amended in the record remaining in the Supreme Court.

To this it is objected, 1. That as the errors are formal, this court will disregard them; and that, therefore, it is not necessary to delay the parties, by sending down the transcript.

2. That the defendant is too late after joinder in error. As to the first point, the suggestion is, that the record in the court below has already been amended. If so, this court, if it now proceeded, would give judgment on a record variant from the transcript; and to preserve a consistency in the proceedings, it is proper, that before a judgment of affirmation or reversal is pronounced, the transcript should be made to correspond with the record of which it imports to be a copy.

The case of *Rutter v. Redstone*, (2 *Stra.* 887.) cited in argument, shows, that after error in the Exchequer Chamber, (the proceedings in which are professedly the model of the proceedings here, as they are expressly referred to and recognized in the rules of this court as to practice,) the transcript was brought back and amended by the original record.

The case of *Tully v. Sparkes*, (2 *Ld. Raym.* 1570.) was in the Exchequer Chamber, on a judgment from the King's Bench. The court were strongly of opinion, that the judgment was erroneous; and after having been twice argued in the Exchequer Chamber, the record was amended in the King's Bench, and the transcript returned to conform it to the original.

In this court, during the session of 1798, in the case of *Cross v. Wardell*, the transcript was amended here; and an order made to direct the amendment of the record by the transcript; and after the order was entered, the judgment was affirmed. I recollect there was some diversity of opinion on the subject, but it passed without much examination.

*The practice in the Court of King's Bench on writs of error, had probably some influence in the determination of the last case. But there, in error from the common pleas, or from inferior courts, the record itself is brought up, and not a transcript.

The question is not here, whether an amendment is proper, for that has been already decided in the court below; but what mode is to be adopted to conform the transcript to the record? The cases from *Strange* and *Lord Raymond* appear to me to conclude forcibly to both the points which have been stated, and to show, beyond a doubt, that the regular mode is to return the transcript, in order to conform it to the original; and that the defendant in error is not too late in his application. The other errors assigned, as to the words not being actionable, will still be available, when the record is returned, if they are now so, should the plaintiff be inclined to prosecute his writ; and if he is content to waive it, the court below have made it

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CLINTON, Senator. This is a motion made by the defendant in error, who was plaintiff in the court below, to transmit the transcript of the record there, for the purpose of being amended, agreeably to the record there, as amended by an order of the Supreme Court, after a joinder in error, in this court.

Although the decision of this question cannot affect our determination on the merits, yet it is of importance that a proper rule should be established, in regard to the correspondence and communication between this court and inferior tribunals.

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The origin and progress of amendments at common law, and under the statutes of *jeofails*, exhibit a curious portion of legal history. At one period, parties were so much harassed by writs of error, brought for *mistakes in orthography, or the slightest clerical misprisions, that the chances for justice were forlorn. Redress, in a very limited form, was, indeed, granted at common law. This, at first, was not extended beyond the term in which the judicial act was done; for during the term, the record was supposed to be in the recollection of the court; but, afterwards, no alteration was admitted. At a subsequent period, the rule was more liberally extended; and all the proceedings were considered as only *in fieri*, and subject to the control of the court, at any time before judgment was rendered and enrolled. Such, however, was the general conduct of the courts of common law in *England*, that justice was entangled in a net of technical form, and the parliament was compelled, by twelve different statutes, denominated the statutes of amendments and *jeofails*, to interfere, and remedy the enormous evil. The amendments, authorized by these statutes, are seldom, if ever, actually made; but their benefit is attained by the courts overlooking the exception. This is an important idea to bear in mind in the decision of this question; for the present application is founded on amendments, made under the statute, and our statute is a transcript of the different acts, passed on this subject, by the *British* parliament. The first enacting section of our statute, which declares, "that no record, or process, shall be annulled or discontinued, by mistaking, in writing, one syllable, or one letter too much or too little," shows the little reliance to be reposed in courts, who would thus overlook the right of the case, and sacrifice the interests of justice to the trifling errors of pleaders and clerks.

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The case of *Tully v. The Executors of Donaldson*, reported in Lord *Raymond*, (p. 1570.) which is relied on as authoritatively binding, and pointedly bearing on the question before us, will, if analyzed, and fully examined, sufficiently prove, that the decision of the court is entitled *to no weight in this place. In the entry of the judgment, the words *ex assensu* were omitted

by the misprision of the clerk ; a trifling error, and expressly cured by one of the statutes of *jeofails*. Error was brought, and after grave discussion, the justices and barons seemed strongly of opinion, that, by reason of this omission in the entry of the judgment, it was erroneous. A motion was thereupon made to amend, which the court overruled ; application for that purpose was then made to the Court of King's Bench, which was granted, after solemn argument ; and at a subsequent term, on motion made in the King's Bench, the transcript of the record in the Exchequer Chamber was amended by the record of the King's Bench ; and the judgment was afterwards affirmed in the Exchequer Chamber by three of the justices of the Common Pleas, and three barons of the Exchequer ; one of the judges being absent, one doubting, and another having voted in the court below. Allowing every weight to this case, it does not appear how the record was remitted from the Exchequer Chamber to the King's Bench ; whether the court granted it on motion, or in what shape, or under what solemnity it went. But it may be justly objected to this decision, that it ought to have little weight in regulating the practice of this court. The whole procedure was a series of solemn trifling, a pertinacious adherence to precedent, and an idolatrous veneration for the *formulas* of pleading, without any regard to justice. An act of parliament had, among other evils, provided, in terms, against the error alleged in this case ; and yet the court turned the party back to the King's Bench, and suspended his rights, when justice might have been administered in the first instance, in perfect conformity to law, and without this serpentine and perplexed course.

Independently, however, of the intrinsic demerits of the proceeding, an objection lies to the court, which furnishes *the precedent. It is not a court of *dernier resort*, nor of general and extensive jurisdiction. Formerly no writ of error lay on a judgment of the King's Bench, except in parliament ; by which means the subject was often disappointed of his writ of error, either by the not sitting of parliament, or by their being engaged in public business, when they did sit.

By a statute of the 27th *Elizabeth*, the Court of Exchequer Chamber was constituted a court of errors, and consists of the justices of the Common Pleas, and the barons of the Exchequer ; but its decisions are not conclusive, as they may be reviewed in the House of Lords, on a writ of error. Besides several classes of cases which are not within its jurisdiction, it cannot, under the statute constituting it, notice errors alleged concerning the jurisdiction of the King's Bench, or for want of form, in any writ, return, plaint, bill, declaration, or other pleading, process, verdict or proceeding whatever. If the case of *Tully v. The Executors of Donaldson* was a mere question of form, as I think it was, the Exchequer Chamber had no right to sustain it. But laying aside all these considerations, ought this

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court of *dernier resort*, to follow implicitly a precedent, furnished by a tribunal of limited and subordinate jurisdiction, proceeding upon untenable grounds, and hesitating between the claims of justice, and the observance of forms.

A writ of error, (2 *Tidd*, 1056.) lies for some error or defect in substance, that is not aided, amended or cured, at common law, or by the statute of amendments and *jeofails*. When error, therefore, is brought, in a case like the present, which is not aided at common law, several questions present themselves :

1st. Whether the statute of amendment and *jeofails* interposes, and cures the error.

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2d. If so, by what tribunal shall the benefits of that statute be administered; by the court alleged to *have committed the error, or by the court to which error is brought, or both?

And, 3dly, in what way shall the remedy be administered?

Our statute of amendments and *jeofails* declares, "that if issue hath been, or hereafter shall be, tried, by the oath of twelve men or more, for the party plaintiff or demandant, or for the party tenant or defendant, plaintiff in assise, vouchee, prayee in aiel, or tenant by receipt, in any manner of action, suit, bill, plaint or demand, in any court of record, then the judges or justices, by whom judgment thereof ought to be given, shall proceed and give judgment in the same, any mispleading, lack of color, insufficient pleading, or *jeofail*, any miscontinuance, or discontinuance, or misconceiving of process, misjoining of the issue, lack of warrant of attorney of the party against whom the issue shall happen to be tried, or any other default or negligence of any of the parties, or of their counsellors or attorneys, had or made, to the contrary notwithstanding; and the judgments thereof to be had and given, shall stand in full strength and force, to all intents and purposes, according to the said verdict, without any reversal or undoing of the same, by writ or otherwise, in like form as though no such default or negligence had ever been had or committed." It further proceeds and declares, "That certain other defects, (particularly specifying them,) and all such omissions, variances, defects, and all other matters, of like nature, not being against the right of the matter of the suit, nor whereby the issue or trial is altered, shall be amended by the justices or other judges of the courts, where such judgments are or shall be given, or whereunto the record is, or shall be removed by writ of error." By a subsequent section, judgments upon confession, *nihil dicit* or *non sum informatus*, are put upon the same footing as judgments grounded on *verdicts. It appears; therefore, that all defects or errors, properly amendable, may be amended in this court, or in other words, passed over, without being actually amended. To permit an inferior tribunal to amend a record after it is before us, would be authorizing them to assume the powers of this court; to deter-

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mine what is error, and what is not; and thus to arrest the cause from the proper *forum*, and indirectly deprive it of its jurisdiction. Besides, there can be no use in the exercise of the right. If the matter assigned for error, is properly amendable, this court may do it; if not, it ought not to permit other tribunals to interfere. The statute of *jeofails*, passed in the reign of *Charles II.*, to which I have referred, was intended to cure several errors, which were before deemed matters of substance; and it was, from its salutary and extensive operation, emphatically denominated the omnipotent act. Our statute on this subject, not only comprehends that of *Charles*, but all those passed before, and subsequently, and may be considered as embracing, as it professes to do, "every default and negligence of the parties, or of their counsellors or attorneys."

If, however, amendments are allowed in inferior tribunals, in any case, after the cause is before us, it appears to me, that the safe, the proper, and the usual course to pursue, is not by sending back the transcript of the record; but by suffering the party to allege diminution, and to bring up the proceedings below, by *certiorari*. This court will then have the whole subject before them, and will be enabled to determine, whether the court below has exceeded its powers, and gone beyond the limits of sound discretion. In the case of *Danvers v. Pendar*, (1 *Wils.* 337.) it was moved for leave to amend the transcript of the record in error, from an inferior court, where there was a mistake, by the record below, upon payment of costs; "*because diminution cannot be alleged in a record in error, from a base court,*" which motion was granted; clearly conveying the idea, that if it was not a base court, then the alleging of diminution was the proper course. According to an adjudged case, on a writ of error to the House of Lords from the Exchequer, that diminution cannot be alleged, (2 *Tidd*, 1103.) in the body of a record contrary to the transcript; doubts may, indeed, arise, whether the allegation of diminution in this case is not incompatible with the transcript, and whether it ought to be admitted. But at all events, the party, after pleading *in nullo est erratum*, admits the record to be perfect; the effect of his plea being, that the record, in its present state, is without error, and, therefore, after a joinder in error, neither party can allege diminution, or pray a *certiorari*.

It is true, that notwithstanding the parties are concluded, after this stage of the controversy, yet this court, in the plenitude of its power, may at any time, *ex officio*, award a *certiorari* to supply a defect in the body of the record, as well as in its branches. I think, however, that I have shown, that this is a case which does not demand an extraordinary interposition.

We are called upon to establish a rule of practice, of considerable importance. In doing this, we must guard our own rights; we must not permit an inferior tribunal to oust us, in

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an indirect way, of our jurisdiction; but the powers deposited with us, as a court of superintending jurisdiction, and of *dernier resort*, must be sedulously maintained, in order to fulfil the great objects for which a tribunal, invested with such a high trust, and such extensive powers, was erected.

I am, therefore, of opinion, that the transcript of the record ought not to be sent back to the Supreme Court.

The majority of the court concurred in this opinion.

Motion denied.

[* 510] *JOHN M'VICKAR, ARCHIBALD PHILIPS and WILLIAM STEWART, *appellants*,
against
OLIVER WOLCOTT, ARCHIBALD GRACIE, MOSES ROGERS, and WILLIAM W. WOOLSEY, *respondents*.

An appeal lies from an order of the Court of Chancery refusing to dissolve an injunction, and awarding costs against the defendants. Where a suit at law was brought by A. against B. and they agreed to submit the same to the arbitration of persons mutually chosen, who decided in favor of A., it is not a sufficient ground for maintaining a bill in chancery, and continuing an injunction, that

IN June, 1803, *Jesse Hopkins*, of the state of *Connecticut*, being in the island of *Barbadoes*, made a contract with *George Cruden*, an agent for the supply of the *British* troops in the *West Indies*, for the delivery of certain cargoes of live cattle and flour. About four cargoes a month were to be shipped from *New-Haven* for the *British* head-quarters in the *West Indies*, which were at *Barbadoes*. *Cruden* agreed to advance about one half of the amount, or 1,000 dollars on each cargo; and on the 29th June, 1803, wrote to his agents in *New-York*, the appellants, trading under the firm of *John M'Vickar & Co.*, informing them of the contract he had made with *Hopkins*, and that he had authorized him to draw on them for the 1,000 dollars advance on each cargo shipped, on sending to them a copy of the bill of lading, and the policy of insurance, by way of security in case of the non-arrival of the cargo. The advances were to be made in 30 days after the documents

A. was the agent of C. for whose use the suit at law was prosecuted, as B. might make the same defence against A. as if the suit had been brought by C., and where a defendant neglects to set up matters in his defence at law, either before arbitrators or a jury, he cannot afterwards make such matters the basis of a suit in equity, unless there was some *accident* or *fraud*, of which the party could not avail himself at law.

A court of chancery will aid a defendant in obtaining a discovery before a trial at law, but not afterwards.

mentioned as security were lodged with *M'Vickar & Co.* In a postscript to the same letter, *Cruden* agreed to dispense with the transfer of the policy of insurance by *Hopkins*, and that *M'Vickar & Co.* might receive other good and satisfactory security, for the money advanced *by them, on the cargoes actually shipped, and duly consigned to *Cruden*.

Hopkins afterwards agreed with the appellants, instead of delivering the policies of insurance, that the respondents and *James Watson*, since deceased, who were then partners, under the firm of *Oliver Wolcott & Co.*, should become sureties to the appellants, for the delivery of the cargoes. Accordingly, on the 20th September, 1803, an agreement was entered into between *Oliver Wolcott & Co.*, in behalf of *Hopkins*, on the one part, and *John M'Vickar & Co.*, in behalf of *George Cruden*, of the other part, by which, after reciting the agreement between *Hopkins* and *Cruden*, *Oliver Wolcott & Co.* engage, on receiving the acceptance of *M'Vickar & Co.* of the drafts of *Hopkins*, for 1,000 dollars, at 30 days, on account of the cargoes of cattle shipped and consigned to *Cruden*, to reimburse *M'Vickar & Co.* each and every advance so made, on whatever cargoes of cattle, as should not arrive to the hands of *Cruden*, within 30 days after advice of the same by either party, together with the charge of interest and commission, by *M'Vickar & Co.* on the amount of such advances. This agreement was signed by the appellants and respondents, in their proper names.

Jesse Hopkins having entered into a partnership with *Asa* and *Daniel Hopkins*, under the firm of *Jesse Hopkins & Co.*, they commenced the shipment of cargoes of cattle, which were consigned to *Cruden*, at *Barbadoes*, or whatever island in the *West Indies* should become *British* head-quarters, and to proceed from thence to any other island, if required by the consignee. Four of the cargoes so shipped gave rise to the present controversy; more particularly three cargoes, shipped in the months of *September*, *October*, and *December*, 1803, and on which *Hopkins* drew bills on the appellants, for 1,000 dollars each, and which were accepted by them. *Upon the acceptance of each bill, *Oliver Wolcott & Co.* gave to the appellants a receipt; and all the bills so accepted were paid to *Oliver Wolcott & Co.*

The three cargoes above-mentioned, on account of the vessels falling to leeward, did not arrive at *Barbadoes*; but reached some of the leeward islands in the *West-Indies*, where they were sold, on account of the shippers. These cargoes, however, were tendered to the agents of *Cruden*, at the different islands where they arrived, but were refused.

By a letter, dated the 15th July, 1804, *Cruden* gave notice to the appellants, that the three cargoes of cattle had not arrived at *Barbadoes*; and that he would not pay or allow the appellants the advances made upon them, but that they must

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look to the security they had taken, for their reimbursement. This letter was received on the 5th *September*, 1804, and was the first notice which the appellants had of the non-arrival of the three cargoes of cattle at *Barbadoes*. About the 1st *October*, 1804, (*John M' Vickar* having been absent from *New-York* at the time the letter was received, and for about three weeks after,) notice was given by the appellants to the respondents, of the non-arrival of the cargoes; and they were requested to reimburse the amount of the advances, with the interest and commission.

After repeated applications, the respondents gave their final answer, that they would not make the reimbursements demanded, on which a suit was commenced against them by the appellants, in the Supreme Court, to recover the amount. By consent of the parties, in *December*, 1806, the cause was referred to three referees, and the usual rule entered for that purpose. The cause was fully heard and discussed before the referees, two of whom, on the 28th *January*, 1807, made a report in favor of the appellants, for 3,740 dollars; the other referee did not concur in the report. Soon after, and *before any judgment could be obtained on the report, the respondents filed their bill in the Court of Chancery, against the appellants; and on the 4th *May*, 1807, an injunction was awarded, to restrain the appellants from prosecuting their suit at law, until the further order of the Court of Chancery.

The bill stated the contract between *Hopkins* and *Cruden*, which it charged, was not formally reduced to writing; but the principal conditions of it were expressed in two letters from *Cruden* to *Hopkins*, dated at *Barbadoes*, the 24th *June*, 1803, which were set forth. In these letters, among other things, *Cruden* says: "Every cargo, on its arrival at *Barbadoes*, or any other island where I have an agent resident, shall be examined by that agent on my part, and any creditable and respectable person that may be appointed on your part; and whatever weight, on an average, they may agree upon, as the real weight of the cattle, to the best of their judgment, that weight I agree to receive the cattle at, and to account to you accordingly," &c. "If it shall, at any time, happen, that the cattle should, from encountering hardships on the passage, from being shipped in bad order, or from any other cause or accident, arrive in bad condition, &c., so as to render them unfit for the use of the troops, it must remain with me, or my agents, in all such cases, to reject the cattle *in toto*, or only to allow such a price for them, as may be agreed on between you or your agents, as sellers, and me or mine, as buyers," &c. The bill then charged, that by the actual agreement, verbally made between *Hopkins* and *Cruden*, cargoes which might fall to the leeward of *Barbadoes*, and arrive at other islands where *Cruden* had agents resident, should be received by those agents, and paid for by him; that *Cruden*, after a full knowl-

edge that the three cargoes had fallen to leeward, and of the facts before stated, as to the shipments, advances and security *given by the respondents, made voluntary remittances to *Hopkins*, to the amount of 18,000 dollars, and upwards. The bill further charged, that the appellants had been reimbursed by *Cruden*, for their advances on the three cargoes of cattle; that *Jesse Hopkins* and *Hopkins & Co.* had become insolvent; that the suit at law was prosecuted by the appellants for the benefit of *Cruden*, who, with *Jesse Hopkins* and *Daniel Hopkins*, were made defendants in the bill. The bill prayed for a discovery and for relief, and a perpetual injunction, to restrain the prosecution of the suit at law.

The appellants, in their answer, denied all knowledge or information of the nature and terms of the contract between *Hopkins* and *Cruden*, except what was derived from the letter of *Cruden* to them, on the 29th June, 1803; that they were ignorant of the remittances made by *Cruden* to *Hopkins*, and *Hopkins & Co.* They deny that *Hopkins & Co.* were insolvent, though they were somewhat embarrassed in 1804; but afterwards continued their ordinary business, and paid their debts; that the appellants were authorized by *Cruden* to draw on *Phyn, Inglis & Co.* of London, to the amount of 10,000 dollars per month, to reimburse their advances made on account of *Cruden*; that they could not draw for more than that sum in any one month, or make up in one month, what their drafts in another month fell short of that sum. That they drew bills on *Phyn, Inglis & Co.* for all their advances, including the advances made on the bills drawn by *Hopkins*, on the three cargoes of cattle; that the bills of *Hopkins* were not presented for acceptance, until after the appellants had, in each instance, accepted bills drawn by *Cruden*, for more than the 10,000 dollars in each month; that *Phyn, Inglis & Co.* refused to accept their bills, to the amount of 40,000 dollars, on the ground, that the appellants had drawn beyond the prescribed credit of 10,000 dollars per month; that these *bills, being protested for non-acceptance and non-payment, were afterwards paid by *Phyn, Inglis & Co.* for the honor of the appellants, as drawers; that they are still liable to *Phyn, Inglis & Co.* for the amount so paid for their honor, and that their credit on *Phyn, Inglis & Co.* on account of *Cruden*, was withdrawn on the 24th January, 1804, and the accounts between the appellants and *Phyn, Inglis & Co.* were unsettled. The appellants further stated, that *Cruden* had constantly refused to allow them the advances made to *Hopkins*, on the bills in question, and that *Cruden* was still indebted to them, in a large amount; and they denied, that the suit at law was instituted or prosecuted for the benefit of *Cruden*, or with his knowledge or concurrence; but was solely for their own benefit.

Cruden did not put in an answer, though measures were pursued to have the bill taken *pro confesso* against him, for a

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default of appearance. On the filing the answer of the appellants, a motion was made in the court below, in *October*, 1807, to dissolve the injunction; and the bill and answer were read, and the motion argued by counsel. On the 30th *October*, 1807, the chancellor ordered that the injunction should be continued; that the appellants should take nothing by their motion, and pay the costs of resisting it. From this order they appealed to this court.

The reasons for the order were thus assigned by

THE CHANCELLOR. The complainants had, in the first instance, made a case which induced the court to grant an injunction; and a motion was made to dissolve it, on the grounds, among others,

1. That the defendants *M'Vickar & Co.* had answered fully, and denied the equity of the bill.

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2. That the matter on which the bill was founded, was available in a defence at law; that the complainants *might have been admitted to show it in their defence before the referees; and that, therefore, they ought now to be concluded.

Preliminary to the examination of the first point, it may be well to remark, that its decision must, in a great measure, depend upon the forms of the court.

I take it to be a settled rule, that where a bill is filed against several defendants, for a joint cause of action, and an injunction issued in consequence thereof, that the complainant is entitled to retain it, if the merits would warrant its issuing in the first instance, until the answers of all the defendants are in.

There are many exceptions to that rule, and its application to each particular case must depend upon the circumstances attending it.

Here the complainants made a case by their bill, showing that the advance in question, was made under the influence, and in pursuance, of a preëxisting contract between *Cruden* and *Hopkins*, undoubtedly in the capacity of agents, and in supposed conformity to the instructions of *Cruden*, their principal; for the bill stated (and the fact was not denied by the defendants' answer, the defendants disavowing any knowledge of the terms of the original contract) that *M'Vickar & Co.*, by its terms, were to make such advances, as agents for *Cruden*.

The defendants' answer admitted, that the sole inducement to the advance was those instructions, and to put the matter beyond all possible doubt, the contract, now the subject of controversy between the parties, expressly purports to have been made by *Oliver Wolcott & Co.* in behalf of *Jesse Hopkins*, and *John M'Vickar & Co.* in behalf of *George Cruden*; and recites so much of the contract, as to identify it, to all the intents which had a bearing on the motion, with the one stated in the complainants' bill.

*The advance was then an incident of the original contract, made by *M Vickar & Co.* in the character of agents, with the eventual replacing of which the defendants had no connection nor any interest; and of consequence, the nature, extent and modification of the credit given to *Cruden*, by the house of *Phyn, Inglis & Co.*, or the exact form in which *Cruden* was to respond to the defendants, must be laid out of the case, as matters to which the complainants were neither parties nor privies.

The only questions were; had the complainants shown that the defendant *Cruden* was an essential party? and could his answer have either a direct or remote influence on the case of the present defendants?

Cruden was not only an essential, but in my view, the principal, party. His contract was the subject of controversy; his advance the subject of claim by the complainants; and whatever complexion the cause might take in its progress, in that stage of it, and with relation to that question, I thought it a clear case.

As to the 2d point.

The defendants at law, I rather thought, could not there have availed themselves of the defence they set up before me; and so thinking, I decided that point according to my impressions, at the time, leaving it open for a further discussion upon a final hearing, after all the parties should be brought in, if it should be then made a point. The complainants alleged in their bill, that they were unable, for want of sufficient proofs, or any confession or discovery, to show several facts material to their defence, and which they particularized, without a discovery, by the defendants, which has always been deemed a good reason for a resort to chancery.

I was, therefore, of opinion, that the injunction ought to be retained; and that the defendants should take nothing by their motion, and should pay the costs of resisting it.

**Sanford*, for the appellants. The object of the bill, in the court below, was to obtain relief against the suit at law, by a perpetual injunction. The answer denies all equity. [* 518]

A preliminary objection may be raised by the respondents, that no appeal will lie from the order of the chancellor, continuing the injunction; but after what has been said in the case of the *Trustees of Huntington* and others v. *Nicoll* and others, (3 *Johns. Rep.* 566.) it is unnecessary to enter into a particular examination of this objection. It would be very grievous and oppressive, in many cases, to stay a party who had obtained a judgment at law, indefinitely, until a final decree in the Court of Chancery.

The chancellor refused to dissolve the injunction, because *Cruden* and *Hopkins* had not answered; but they are strangers to the suit at law. The judgment was obtained by *M Vickar*

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& Co. only. It will be easy to stop proceedings at law, by making strangers, residing in remote places, parties to a bill for an injunction, if it cannot be dissolved until all the parties have answered. It is true, the bill against those defendants, who do not answer, may be taken *pro confesso*. Still the hardship and inconvenience are great. Even if the answers of *Cruden* and *Hopkins* had been put in, they could not be used against *M^r Vickar & Co.*, their co-defendants. (*Mitford*, 152. 2 *Vernon*, 380. 3 *P. Wms.* 311.) Their not answering, therefore, can be no reason for continuing the injunction.

The letter of *Cruden* to *M^r Vickar & Co.* is the basis of the agreement; the contract between *Wolcott & Co.* and *M^r Vickar & Co.* is founded on this letter. *Hopkins* shipped the cattle, and drew bills, which were accepted by *M^r Vickar & Co.*, and paid to *Wolcott & Co.*, who gave a receipt, that the acceptance was according to the agreement. The three cargoes of cattle never arrived at *Barbadoes*, which was always the *British* headquarters, *and where they ought to have arrived, pursuant to the contract with *Cruden*. As *Wolcott & Co.* were bound to refund the money, in case the cargoes did not arrive, the *casus fæderis* happened, and the defendants were, by law, bound to refund. The appellants did, in fact, prevail at law. No question of law is, therefore, to be raised or discussed.

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The equity set up in the bill is, that *Cruden*, by his contract with *Hopkins*, was bound to receive the cattle at any of the leeward islands at which they arrived, and where *Cruden* had agents; and that the cattle did arrive at a leeward island, where there was an agent of *Cruden*. *Barbadoes* is the most wind ward island.

The contract set forth in the bill, between *Cruden* and *Hopkins*, is very different from the contract between the appellants and respondents, which speaks only of the event of the arrival of the cattle at *Barbadoes*: But it is stated that the suit is for the benefit of *Cruden*. Still both the grounds of equity, namely, that *Cruden* was bound to receive the cattle at the place where they arrived, and that the suit is for the benefit of *Cruden*, are denied by the appellants, in their answer in the court below.

Admitting, however, the contract between *Cruden* and *Hopkins* to be as stated by the respondents, it cannot affect the contract between the appellants and respondents, which is *res inter alios acta*, and wholly independent of the other. It is a personal contract, binding only on the parties who signed it. As the appellants were not parties, nor privies to the former contract, they are not chargeable with a knowledge of it. That contract is also stated to have been by *parol*; and *res inter alios gesta nocere non debent*.

Should it be said that *Hopkins* is insolvent, and that if the respondents are compelled to pay the money to the appellants, they could not recover it from *Hopkins*; *it may be answered, that this would be the misfortune of the respondents, but it

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furnishes no ground of equitable relief against this contract. If the cargoes had sunk at sea, the respondents must have been liable, whatever might have been the situation of *Hopkins*. The money was advanced by the appellants to the respondents; and for aught that appears, it is still in their hands. If they have paid it over to *Hopkins*, they should have taken care to secure themselves against their ultimate liability on their contract with the appellants.

It will be said, that the appellants have received the money which they now claim of the respondents. It is true, they received bills on *London*, for the amount, in the course of business. *Cruden* had a fund in *London*, and he was to draw on his correspondent in *New-York*, who was to draw on the person holding the fund in *London*. The bills received were to the use of *Cruden*. Suppose the cargoes had been lost by the perils of the sea, would the respondents be allowed to make this objection to an action against them, on their contract with the appellants? As the cattle did not arrive, it is the same as if they were lost. If the bills were not paid, the appellants could not have recourse to *Cruden*. The appellants were instructed to take security for their advances, and they made them at their own peril. The appellants had no authority to draw for more than 10,000 dollars per month; and the bills drawn for the cargoes in question, were an excess beyond that sum. These bills were protested; and *Phyn, Inglis & Co.* paid them, *supra* protest, for the honor of the drawers, who are, therefore, liable to them for the amount.

The fund in *London* belonged to *Cruden*, and was under his control; *Cruden* refuses to allow the appellants the amount of these advances; and *Phyn, Inglis & Co.* will of course require the appellants to pay the amount. It follows, that the appellants are without remedy, if they cannot recover the amount of the respondents.

The appellants merely ask to have the injunction dissolved; it cannot affect the rights of the respondents, if, on a final hearing, they shall be able to establish them. Where the answer denies all the equity of the bill, it is a rule of course, to dissolve the injunction.

Again, the respondents voluntarily consented to refer the cause to the decision of arbitrators; and are, therefore, now entitled to much less favor, after the report or decision of those arbitrators.

S. M. Hopkins and *Van Vechten*, for the respondents. From the nature and effect of the transactions in this case, it is manifest, that the advances made by the appellants to *Hopkins* were out of the funds of *Cruden*; they were made in pursuance of the agreement between *Cruden* and *Hopkins*, by the agents of the former to the agents of the latter. The contract between the appellants and respondents is collateral to, and dependent

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on the contract between *Cruden* and *Hopkins*, and is to be governed by the terms and effect of the original transaction. The appellants, in fact, advanced the money of *Cruden*; it was an order from him to his agents, to pay money to the respondents, on his account, and to charge it to him. By receiving the money, the respondents did not become indebted to the appellants, but to *Cruden*, the principal. If, then, *Hopkins* is not responsible to *Cruden*, for the money advanced, the respondents are not liable to the appellants.

Again, there is more equity in the case of the respondents, as mere sureties. *Cruden*, long after the advances were made, had property belonging to *Hopkins* in his hands, which he ought to have applied to his own indemnity; and as he did not secure himself out of those funds, *but remitted them to *Hopkins*, the respondents ought to be exonerated.

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On these grounds, the respondents filed a bill in the Court of Chancery, for a discovery and an account; for if it should appear from the account between *Cruden* and *Hopkins*, that nothing was due to *Cruden*, or if, on a final account between the appellants and *Cruden*, nothing should be due to the latter, then there could be no claim against the respondents. That *Cruden* was the principal, in the whole transaction, and the respondents merely sureties for *Hopkins*, is clear from the facts in the case. The suit at law was for his benefit; he was a material party; and the respondents ought to retain the injunction until his answer is put in, and the whole equity of the bill denied.

It is a mistaken notion, that the respondents were bound to reimburse the appellants personally. The court, in construing the agreement, will look rather to the nature of the transactions between the parties, than to the words of the contract, in order to discover the scope and intent of the agreement. (*Ludlow v. Simond*, 2 *Caines's Cases in Error*, 43.) The liability of one party cannot be increased by the acts or conduct of the other party. The appellants, by drawing, or overdrawing bills, cannot alter the responsibility of the respondents; nor can *Cruden*, by refusing to receive the cargoes, change that responsibility.

Hopkins, by the contract with *Cruden*, had an election to land the cargoes to be shipped, either at *Barbadoes*, or at any leeward island, where *Cruden* had an agent. The performance of either part of the alternative, was sufficient. (*Co. Lit.* 145. a. 4 *Burr.* 2052. 2056. *Roll. Abr.* 446.) If *Hopkins* went to *Barbadoes*, it was enough; he was not bound to carry the cargoes farther.

Again, the respondents have a right to insist on the practical construction given to this contract by *Cruden* himself, who received and paid for one of the cargoes, that arrived at a leeward island.

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*Where a creditor has an opportunity to reimburse himself out of the funds of the principal debtor, in his hands,
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he ought to do it; and if he fails to do so, the surety of such debtor is exonerated. (*Law v. E. I. Company*, 4 *Vessey*, jun. 324.) Here the suretiship was at the commencement of the transactions between *Cruden* and *Hopkins*. Funds were continually coming into the hands of *Cruden*, afterwards, out of which he might have indemnified himself for any advances, as to the first cargoes which did not arrive; and for that purpose, notice was to be given to *Cruden* of the amount specifically advanced on each cargo which was shipped.

It is to be observed, also, that eleven months elapsed, after the cargoes were shipped, before *Cruden* directed the appellants to make any demand on the respondents. By this long delay, the respondents lost the opportunity of reimbursing themselves out of any moneys of *Hopkins*, which might have come into their hands; all the transactions between him and them having been long before closed. *Cruden* was bound to give notice to the respondents, and to make his demand in a reasonable time. (1 *Roll. Abr.* 463. 469. *Hob.* 51. *Hardres*, 42. *Cro. Jac.* 432.) Whether the respondents did know or not, of the non-arrival of the cargoes, can make no difference; their responsibility depended on the notice they were to receive from *Cruden*, or the appellants.

Until the appellants have actually paid the money out of their own pockets, they can have no equitable claim against the respondents. Admitting that *Phyn, Inglis & Co.* paid the bills for the honor of the drawers, yet it does not appear that the appellants have ever been called upon by *Phyn, Inglis & Co.* for the amount. It has been asked, How are the appellants to get back their money, unless from the respondents? It may be answered, that they have already the money in their hands.

As to the award; if the appellants meant to rely on that as conclusive, it ought to have been pleaded, or if *set forth in the complainant's bill, they should have demurred. (*Mitford's Plead.* 204. 296. 209.) An award is not more conclusive than a judgment; and that must be pleaded. (1 *Vesey*, 327. 331. 3 *Alk.* 223.) Again, the award was concerning the suit at law; but the suit in chancery is between different parties; and in which equitable considerations arise, which would not be made to appear in a court at law.

Hoffman, in reply. The agreement of the 20th September, 1803, must be the basis of the decision of the court. All prior parol communications, between *Cruden* and *Hopkins*, or between them and the present parties, are to be disregarded. The written contract alone is to be considered. The appellants had an interest in this contract, and a claim of benefit under it. Much of the argument, therefore, on the other side, becomes inapplicable, if the appellants have an equitable interest in the contract of which they cannot be divested by any

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acts of *Cruden*. It does not follow, that, because they are the agents of *Cruden*, that they have no interest in the contract; the agent, as well as the principal, may have a right, at the same time, in the same contract. As if an agent sells goods, to be paid for on a certain day, the principal cannot receive the money until the agent is first paid for any balance due to him from the principal. Again, suppose the agent makes advances on the credit of his principal, which he is legally bound to refund, but not trusting to that responsibility, the agent also chooses to take security; the legal responsibility of the principal cannot prevent the agent from resorting to the security he has taken. The rule is the same in equity as in law. No doubt the respondents were agents; but in their contract with the appellants, they do not bind themselves as agents. Where a person is to be charged as agent, he must subscribe himself as such, otherwise he is personally responsible. The only *exception to the rule, is in favor of the public agents of government.

Suppose the cargoes shipped by *Hopkins* had been lost at sea, would the appellants have a right to resort to the respondents for indemnity, in case of the death or bankruptcy of *Cruden*? Could the assignees of *Cruden* compel the appellants to give up the contract made with the respondents, until they were first reimbursed for their advances? If not, then the appellants have an equitable *lien*, as well as a legal claim, on the security of the respondents.

But it is said that the appellants are already paid. That is, they are paid out of their own *funds* or *credit* with *Phyn, Inglis & Co.*, who paid the bills for their honor.

Again, the respondents had a complete remedy at law, where they might have set up in their defence, what they now make a ground for relief in equity. A court of equity has no more power than a court of law to correct any errors of the arbitrators. It is, then, merely a bill for the discovery of facts essential to a legal defence. But a bill of discovery, after a verdict, will not be sustained, when the discovery might have been had prior to the verdict. The respondents might have had the benefit of the discovery prayed for, at the hearing before the arbitrators. *Cruden* might have been examined as a witness.

But it is said, that the suit is prosecuted for the benefit of *Cruden*; and this secret trust is, indeed, the only ground stated in the bill, for granting the injunction; yet as the answer expressly denied such secret trust, there was no reason for continuing the injunction.

The arbitration was voluntary; it was not a reference under the statute, but by the consent of the parties; and the award must be conclusive. Its merits are not to be inquired into by the court, unless fraud or collusion is *alleged. The appellants were not bound to plead the award. But it is said that *Cruden*

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was not bound by the award; yet if the appellants were his agents, he would be bound; and if they were not his agents, then he is a perfect stranger to the cause.

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VAN NESS, J. Several questions on the argument of this cause, were presented for our decision; but as I am of opinion that the appellants have, by their answer, denied the whole equity of the bill, it is unnecessary for me to notice many of them.

A suit was commenced by the appellants, in the Supreme Court, upon the contract entered into between the present parties, on the 20th *September*, 1803. Issue was joined in the cause, and after being noticed for trial, it was, by mutual consent, referred to three persons nominated and elected by the parties.

The referees proceeded to the hearing of the cause; both parties appeared before them, and after their proofs and allegations had been exhibited, and after a full discussion of the merits, two of them made a report in favor of the appellants.

Soon after the decision of the referees, the present bill was filed, and the appellants were enjoined from further proceedings in the suit at law.

Upon the filing of the answer, an application was made to the chancellor, to dissolve the injunction, which was denied; and his decision on that application is the subject of the present appeal. This is a summary of the proceedings, before the cause came into this court.

The counsel for the respondents admit, that the suit in the Supreme Court was not referable under the statute. The submission, therefore, to the referees, was in the nature of an arbitration, and the report in relation to the merits of the controversy is final and conclusive between the parties.

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Whether the contract of the 20th *September*, 1803, enured exclusively to the benefit of *Cruden*, or whether, in the event of the non-arrival of the cargoes, the appellants acquired a concurrent right with *Cruden*, to resort to that contract, to reimburse their advances, it is not necessary here to decide; for in either case, the injunction ought, in my opinion, to be dissolved.

If the contract was exclusively for the benefit of *Cruden*, although the remedy at law upon it must necessarily be pursued in the name of the appellants, yet the recovery would be for the use of *Cruden*. In that case, the respondents might have availed themselves, at law, of every defence which would have been admissible, provided *Cruden* had himself been a party upon the record; and if the construction of the contract contended for by the respondents be the true one, we are to presume, that such a defence was made and relied upon.

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And here I will dispose of another point, as connected with this part of the case. One ground upon which the respondents seek relief against the report of the referees is, that they have not had an opportunity of using the evidence of the trial at law, which *Cruden's* answer to a bill of discovery would have afforded. Granting, for a moment, that such answer would have furnished the respondents with a complete defence, still, as they omitted to take the necessary steps to possess themselves of that answer, before the trial at law, which they might, and, if they deemed it important, ought to have pursued, they are now too late. I am satisfied, that the appellants, notwithstanding they have answered the bill, are at full liberty to avail themselves of this objection.

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*If the contract of the 20th *September*, in the event of the non-arrival of the cargoes, was an accumulative remedy for the appellants, to indemnify them for their advances to *Hopkins*, then *Cruden's* answer could not, either in the trial at law, or in the court below, prejudice the rights of the appellants. Whatever, therefore, may be the true construction of the contract, (upon which, for the reason I have mentioned, I give no opinion, though I have formed one,) the result must, in reference to the question now before this court, be the same.

I am of opinion, therefore, that the order for the injunction ought to be reversed.

SPENCER, J. This appeal is from an order of the Court of Chancery, continuing an injunction after answer, and directing the payment of costs by the appellants to the respondents, for resisting the motion to dissolve the injunction, issued on filing the bill.

It has been objected preliminarily, that no appeal is maintainable upon an order like the present. The 22d article of the constitution, and the 8th section of the act regulating proceedings on appeal and error, have been cited. The constitution does not profess to specify any regulations upon the subject; but directs, that a court shall be instituted, for the trial of impeachments and the correction of errors, under the regulations which shall be established by the legislature. The section of the statute referred to, declares that all persons aggrieved by any sentence, judgment, decree or order of the Court of Chancery, or Court of Probate, may appeal from the same, or any part thereof, to this court. (a)

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The decision of the chancellor, in denying a dissolution of the injunction, directing it to be retained, and awarding costs against the appellants, brings this case within the terms of the statute. An order of that court has intervened, in relation to which the appellants are *aggrieved by the payment of costs, if that order is not justified on legal principles.

That orders may be appealed from, it is now too late to controvert; the practice of this court, in hearing such appeals in a variety of cases, has given a construction to the statute not to be shaken. Without undertaking to draw the line between such orders as may or may not be appealed from, in my opinion, this is an order from which an appeal lies: in coming to a decision on a motion before the Court of Chancery, there must necessarily have been an examination into the merits of the case, as disclosed by bill and answer, and the appellants have sustained a *gravamen*, in the payment of costs.

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The ground of the opinion of the court below, in ordering the injunction to be retained, was, that *George Cruden* was a principal in the contract between *M'Vickar & Co.* and *Wolcott & Co.*, and that *M'Vickar & Co.* were agents merely, having no interest themselves in the contract; on that principle, the injunction was continued, until the coming in of *Cruden's* answer. It becomes necessary to ascertain the relation which the appellants have to *Cruden*, and their rights under the contract with the respondents, taken in connection with the contract between *Cruden* and *Jesse Hopkins*, and how far forth the hearing before the referees or arbitrators will conclude the respondents.

It is certain, that the letter from *Cruden* to the appellants, of the 29th of *June*, 1803, led to the contract of *September* the 20th, in that year, between these parties. In that respect, the appellants may be considered as the agents of *Cruden*; his directions were pursued in taking the security, and in adjusting the terms of the contract; and in case of the arrival of the cargoes, the appellants had resort, for a reimbursement of their advances, to *Cruden* alone. If, however, the cargoes did not arrive according to the stipulations in the contract, then the appellants were possessed of a security to them individually and specifically, by which they had a right in their own names, to reclaim from the respondents the advances they had made under the contract.

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The caption of the contract purports, that it was entered into between the respondents, in behalf of *Hopkins*, and the appellants, in behalf of *Cruden*. This is merely introductory, and can have no control over the stipulations it may contain, unless there be ambiguity and doubt, as to the effect of those stipulations. The body of the contract is explicit; and by it the respondents undertook and engaged, on receiving the acceptance of the appellants to *Hopkins's* drafts for 1,000 dollars, at 30 days, on account of such cargoes of cattle, shipped and consigned to *Cruden*, to reimburse the appellants, each and every advance made on whatever cargoes of cattle did not

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arrive safe to the hands of *Cruden*, within 30 days from the advice of the same, by either party.

If the *casus fæderis* happened, nothing could prevent the appellants from recurring to their remedy, under the contract; it is true, this money, when recovered, might enure to the benefit of *Cruden*; and there might be a state of things in which it would not. If, for instance, the appellants had not drawn on *Phyn, Inglis & Co.* at all, to reimburse themselves, or if, as is alleged by the answer, their drafts were protested; in either of these events, I cannot conceive that any court could divest the appellants of a security which they had acquired, and of rights which justice and equity would warrant their holding.

I may, therefore, conclude, that in some respects, the appellants were the agents of *Cruden*; and in some respects, they had rights not liable to his control.

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The appellants, conceiving their right to a reimbursement from the respondents had attached, prosecuted at law; and the cause was referred to three persons mutually agreed upon, not as a case within the provisions of the statute authorizing references. Two of the referees reported in favor of the appellants; and to avoid that report, this suit was instituted. The principal grounds of the bill are, that by the actual agreement between *Cruden* and *Hopkins*, cargoes which, by any accident, should fall to the leeward of *Barbadoes*, should be received at any island where *Cruden* had an agent residing. That *Cruden* would cause about 1,000 dollars to be advanced on each cargo, in *America*, through the appellants; and for that purpose, he wrote the letter of the 29th June, 1803. That the respondents became *Hopkins's* sureties in lieu of the policies, and the agreement of the 20th September was then made. That in August, 1803, *Hopkins* began to ship cargoes on the contract, and in that and the two succeeding months, four vessels sailed with cargoes, fell to leeward, but arrived at other *British* islands, where *Cruden* had agents resident. That *Hopkins* made four drafts on the appellants, which were accepted and paid. That it is usual for such vessels to fall to leeward, and that the cargoes were of the description and quality, which *Cruden* was obliged by his contract to receive. That *Cruden* received one of the cargoes at *Antigua*, and thus gave a construction to the contract; but improperly refused the other cargoes. That *Cruden*, with a full knowledge of the facts as to the advances, shipments, arrival and refusal, and of the suretyship of the respondents, made voluntary remittances to *Hopkins*. That the appellants and *Cruden*, during the time that their remittances were making, and until long after *Hopkins's* insolvency, never gave the respondents notice that they were held responsible; and that if timely notice had been given, they might have secured themselves. That the appellants have, in some way, been repaid the advances, and the nature of their

credit on *Phyn, Inglis & Co.* is stated. That the advances made by the appellants, were not on the credit of the respondents, nor charged against them; nor have they relieved *Cruden*. That *Cruden* and *Phyn, Inglis & Co.* were solvent; and that *Hopkins* was, in 1804, and yet is, insolvent, and that the respondents have no competent security. That the appellants had sued at law, a reference had taken place, and the referees had reported, and that they prosecute for the benefit of *Cruden*. That on the hearing, the respondents could not, for want of proof, and of a discovery from the appellants, show at what time *Cruden* had notice of the advances made by the appellants, or of the non-arrival of the four cargoes; and were unable to prove that such notice existed, previous to the 3d June, 1804, though they believe the appellants had the means of showing this; and that the referees, in making up their report, have excluded from their consideration the point arising from the remittances made by *Cruden* to *Hopkins*, as not being within the cognizance of a court of common law, but exclusively of equitable jurisdiction.

I have been thus minute in detailing the bill, that no part may escape the consideration due to it. It is not material to go minutely into the answer; the appellants deny the existence of the most material facts set up, or declare their ignorance of them. They particularly deny, that they have been reimbursed from *Cruden*, or by their drafts on *Phyn, Inglis & Co.*, for the advances they now claim, though they admit that they did draw on *Phyn, Inglis & Co.* for them; but which drafts, owing to their having exceeded the monthly sum they were authorized to draw for, have been protested for non-acceptance and non-payment, and have been eventually paid for the honor of the drawers. They deny that the suit at law was prosecuted for the benefit of *Cruden*, but allege it was for their own benefit, and that they look *alone to the respondents to be reimbursed; and they insist, that the referees did not exclude any point of defence from their consideration, as being of equitable jurisdiction.

Whether the trial before the referees be considered as a trial, on strictly legal principles, or as before arbitrators of the parties' own choosing, it may not be very essential to examine. In either view, it draws after it consequences, which, in my opinion, are decisive in the present case; for it is an undeniable proposition, that a defence which might be made at law, and which a party will either omit or decline to make, cannot be the basis of a suit in equity; unless it be in cases of *fraud, accident* or *trust*, peculiarly within the province of a court of equity, or where the jurisdiction of the legal tribunal cannot admit the defence.

In the present case, it was a matter of inquiry, before the referees, whether the cargoes had arrived pursuant to the contract; and whether *Cruden* was, under the contract between

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him and *Hopkins*, bound to receive the cargoes at any other island than *Barbadoes*, or whatever island might become *British* head-quarters. The referees, in reporting in favor of the respondents, must have decided, either that the cargoes did not arrive at all, or did not arrive at the island contemplated and agreed upon between the parties to the contract. Their decision is final upon this point, and no court of law or equity should disturb it.

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There is nothing of a peculiarly equitable jurisdiction, in ascertaining whether the appellants were agents to *Cruden*, and having no rights of their own, distinct from his. This was a proper subject for discussion, even in a court of law; and at law, the beneficial interest of a third person will be regarded and upheld, against even the acts of the trustee. A variety of cases might be mentioned, *where this has been done at law; hence it was a matter which was, or might have been, brought before the referees, if the respondents were agents without any interest or right in the contract, that *Cruden* made remittances to *Hopkins*, to the fraud and injury of the respondents. It is equally a decisive answer to this ground of equity, that there is no pretence that the respondents offered evidence to the referees, which could have influenced their decision; for, by their bill, they state their inability to do so, for the want of proof, and of discovery from the appellants, as to the time that *Cruden* had notice of the advances made, and the non-arrival of the four cargoes. A court of equity, it is true, is ancillary to a court of law, and would have afforded the respondents its aid in gaining a discovery before trial, but not after; and it appears to me to be novel and unprecedented, to ask a review of a cause, at law or in equity, because a party has gone to trial without sufficient proof, which, if diligent, he might have obtained. There is another answer to this ground of equity; it is denied that the referees did exclude this subject from their consideration, on the ground of its being exclusively of equitable jurisdiction.

In short, the only colorable ground of equity in the bill is, that the suit at law is prosecuted for *Cruden's* benefit; and this is pointedly denied by the answer. It is scarcely necessary to remark, that the answer is to be taken as true, in those parts which are answers to interrogatories, until disproved.

The injunction, then, in my opinion, ought not to have been continued, under any notion that there was an equity stated in the bill, which was not denied; nor upon the idea that the appellants were agents, and not invested with any rights

peculiar to themselves. The contract was theirs; it was an additional security in case of the non-arrival of the cargoes; and though *Cruden* was *liable to the appellants, the respondents were also liable, when the contingency to make them so happened.

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There are cases in which a court of chancery will not dissolve an injunction, until all the defendants have answered; but those are cases, where the defendants have an identity of interests, and where the act of one will affect the other. In the present case, I have already stated, that there is not an identity of interests between the appellants and *Cruden*; the answer of the latter could never be read as evidence against the appellants. It was, therefore, improper to restrain the appellants, by an injunction, from availing themselves of a legal remedy they acquired in a due course of law, until *Cruden's* answer came in. I am, therefore, of opinion, that the order appealed from ought to be reversed.

KENT, Ch. J., declared himself to be of the same opinion.

The majority of the court being of the same opinion, it was thereupon ORDERED, ADJUDGED and DECREED, that the order of the Court of Chancery complained of, be reversed; and that the complainants' bill in the said cause be dismissed with costs; and that the record and proceedings be remitted to the Court of Chancery, to be executed according to law.

Judgment reversed.

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*COMFORT SANDS, HENRY SANDS, LEWIS SANDS, NATHANIEL PRIME, and others, *appellants*,
against
GEORGE CODWISE, jun., PETER LUDLOW, JAMES CODWISE, ROBERT MORRIS, JAMES LUDLUM, JONATHAN OGDEN, ISAAC COCK, ALLEN CLAPP, JACOB VALENTINE, and MICHAEL MERRIT, *respondents*.

What acts and circumstances of fraud, will avoid conveyances, as against creditors.

Conveyances made to defeat creditors are void by common law as well as by the statute of frauds.

Where deeds are void, on the ground of absolute fraud, they are to be considered as void *ab initio*, and are not allowed to stand as security to the grantee, for advances he may

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have made, or responsibilities he may have entered into, on account of them. Where the grantor of a deed, made to defeat creditors, afterwards becomes a bankrupt, the grantee is accountable for the rents and profits, subsequent to the act of bankruptcy, or from the time when the right of the creditors to call him to account accrued, and not before.

Where a bill

in chancery was filed by creditors, to set aside the deeds of a bankrupt, on the ground of fraud, it was held, that the property was not to be placed in the hands of a master, but was to be disposed of by the assignees of the bankrupt, according to the bankrupt law of the *United States*.

On an appeal, this court will decide on those parts only of the decree of the court below, which are complained of in the petition of appeal.

THE respondents filed their bill in the Court of Chancery, as creditors of the appellant *Comfort Sands*, for themselves, and all the other creditors of *Comfort Sands*, who should be adjudged entitled so to do, and who should come in and contribute to the expenses of the suit, or any other proceedings which might be directed, or take place, in consequence of such suit, against the appellants, and others, made defendants.

The appellant *Comfort Sands*, for many years, prior to the year 1797, was extensively concerned in business, as a merchant, and was reputed to be a person of large estate. About the year 1797, he became indebted to the respondents, in the sums of money mentioned in their bill, and which remain unpaid. In the year 1797, and after, being indebted to the respondents, he became embarrassed in his affairs, stopped payment, and pretended to be unable to pay his debts, but did not exhibit to his creditors a statement of his affairs.

At the time he stopped payment, he was possessed of a large personal estate, and a large and valuable real estate; part of which was situated in the city of *New-York*; part in *Brooklyn*, in *King's* county; part at *Schaticoke*, in *Rensselaer* county; part in *Ministink*, in *Orange* county; some in the city of *Washington*, in the territory of the *United States*, besides lands in the state of *Georgia*, and elsewhere.

When he stopped payment, *H. and S. Johnson* were endorsers on his notes, for his accommodation; and on a settlement of accounts, in *February*, 1798, there was a balance due from him to the said *H. and S. Johnson*, of 12,634 dollars and 11 cents, of which he paid them, soon after, 800 dollars; and they still remained endorsers on a note, remaining in the bank of *New-York*, for 2,500 dollars, which, added to the balance of account, made the sum of 14,334 dollars and 11 cents; for which sum he voluntarily gave to them a bond and warrant of attorney, on which judgment was entered up against him, in *July*, 1798,

and was the first judgment against him. A *fiery facias* was soon after issued on the said judgment, which was levied on the household furniture, and other personal property of *Comfort Sands*, and on his dwelling-house in *Pine street*, and another dwelling-house in *Cedar street*. In *November, 1798*, the sheriff sold the personal property taken on the execution, at public auction, to the appellant *Nathaniel Prime*, the son-in-law of the said *Comfort Sands*, as the highest bidder, for 1,371 dollars and 37 cents, being less than its real value. *Prime*, with the consent of the plaintiffs named in the execution, gave his note for the amount; but whether he afterwards paid it, did not appear. He left the property in the possession of *Comfort Sands*, who had the use of it, until his bankruptcy.

The houses in *Pine* and *Cedar streets* were also exposed to sale by the sheriff, and were struck off to *John Swartwout*, as the highest bidder, for 11,000 dollars; and *H. and S. Johnson* agreed to receive in payment *from the purchaser, their own notes, originally given to *Melancthon Smith*, and which had come into the hands of *Comfort Sands*, amounting to 9,116 dollars and 25 cents, and a note, endorsed by them and *Francis Wainwright*, for 2,500 dollars. These notes were obtained by *Comfort Sands*, and delivered to *Swartwout*, who delivered them to *H. and S. Johnson*, who thereupon directed the sheriff to make a conveyance of the property to *Swartwout*, who was bail for *Comfort Sands*, and his surety on bonds at the custom-house. In *January, 1801*, *Comfort Sands* having exonerated *Swartwout* from his responsibilities for him, the latter agreed to convey the houses in *Pine* and *Cedar streets* to any person the former might appoint. In *April, 1801*, he conveyed the same houses to *Lewis Sands*, a son of *Comfort Sands*, (who, in his answer, stated he received his note for 11,000 dollars,) subject to a mortgage to *Samuel Jones*, and *John Haring*, for 2,312 dollars. In *July, 1801*, *Comfort Sands* moved into the house in *Pine street*, and occupied it for some time afterwards. The houses and lots, in *Pine* and *Cedar streets*, are stated to have cost, in 1794 and 1795, 13,750 dollars.

In *July, 1798*, *Comfort Sands* mortgaged his estate in *Brooklyn*, to the bank of *New-York*, to secure the payment of 50,000 dollars, with interest; and the value of the property was alleged in the bill, to be 100,000 dollars. Afterwards, in *July, 1798*, he conveyed the same property to his son, *Henry Sands*, for the consideration of 60,000 dollars, of which he was to pay 56,000 to the bank of *New-York*, which included what was due, and one year's interest in advance; and the remaining 4,000 dollars was to be paid to *Comfort Sands*. Notwithstanding the sale, *Comfort Sands* continued to exercise acts of ownership over the property; speaking of it as his own, making verbal leases of some parts, and written leases of other parts, paying the taxes and offering parts of *it for sale, and actually selling portions of the property to several persons.

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In *July*, 1798, *Comfort Sands* conveyed all his lands in *Schaticoke* to his son, *Henry Sands*, for the consideration of 8,020 dollars; and in *September*, 1800, he conveyed to the same son, all his real estate in *Minisink*, for the consideration of 8,125 dollars, of which, 7,125 dollars was to be paid to one *Clayton*, on account of a debt due to him from *Comfort Sands*, and 1,000 to the appellant himself, as he stated in his answer.

In *November*, 1800, *Comfort Sands* conveyed to his son, *Lewis Sands*, all his real estate in the city of *Washington*, for the consideration of 9,000 dollars. At the time of his stopping payment, *Comfort Sands* also had a claim against the *United States*, for a large sum of money, the amount of which had been previously settled by arbitrators; and which he assigned to *Nathaniel Prime*, for the sum of 5 dollars, in trust, to pay certain creditors.

Comfort Sands was possessed of real estate in *James street*, in the city of *New-York*, which was mortgaged to the bank of *New-York*; and on the 5th *September*, 1800, having paid the sum for which it was pledged, the bank, by his direction, conveyed the estate to *Robert Sands*, his brother, who, as was alleged in the bill, did not pay *Comfort Sands* any thing for the property; but held it in trust for *Comfort Sands*, who continued to receive the rents and profits.

In the year 1796, *C. Sands* was owner of three lots of ground in *Greenwich street*; one of which, he conveyed to each of his three daughters, *Cornelia*, *Frances* and *Sarah Maria*, for the consideration of five shillings, for their advancement, and better provision in life. *Sarah Maria* died in 1802, and her father received the rents and profits of the lot.

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**Joseph Sands*, the eldest son of *Comfort Sands*, went to *Europe*, in 1790, where he transacted business for his father, as his agent; and settled a claim on the government of *France*, for 150,840 livres, which was registered in the name of *Joseph Sands*, out of which he was directed to pay certain debts of *Comfort Sands*; but whether he paid such debts, or what became of the fund, did not appear.

Comfort Sands, refusing to pay his creditors or to give them a satisfactory account of his affairs, was sued; and in *August*, 1798, was taken in execution, and imprisoned in *King's county*, where he continued, until *July*, 1801. A *capias ad respondendum* having been issued against him, in *January*, 1801, on which he was arrested, and having continued in custody, under the arrest, for more than two months, without giving bail, a commission of bankruptcy was issued against him, on the 22d *June*, 1801, on which he was declared a bankrupt.

Isaac Kibbe having been chosen an assignee, all the real and personal estate of the bankrupt was assigned to him, on the 18th *July*, 1801; and the respondents proved their debts under the commission. In a letter written by *Comfort Sands* to a mercantile house in *England*, who were his creditors, two days
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after the commission of bankruptcy issued, he says ; " That the proceedings of some of his ill-natured creditors had brought him to a determination of being made a bankrupt ; and that he had then arranged with all his friendly creditors, and had only his hostile ones to contend with, who would suffer for their conduct, and not get 5 per cent for their demands ;" and he admitted, that he intended to become a bankrupt, in the beginning of June, 1801.

On his examination before the commissioners, he did not admit that he was possessed of any real or personal estate, at the time of his becoming a bankrupt, except his claim on the *French* government, liquidated in the name of *Joseph Sands*, his son and agent, of which he had made some previous appropriations ; and some out-standing debts and claims of little value.

The bill of the respondents charged, that the conveyances to the sons and brother of *Comfort Sands*, above-mentioned, were made with intent to defraud his creditors ; that *Lewis Sands* and *Henry Sands* were young men, possessed of little or no property, and dependent on their father ; that the sums mentioned in the deeds were nominal and inadequate, and were never paid by them, or if they gave notes or securities, they were merely colorable, and afterwards given up, or changed, so as to suit the fraudulent intent of *Comfort Sands*, and the property held as in trust, for him, or his particular friends ; that after the conveyances were made, he exercised various acts of ownership over the estates ; and that he declared, on his examination before the commissioners of bankruptcy, that he considered the estates in the hands of his sons, as funds for the payment of such debts as he chose to pay ; and that he had made arrangements to have them applied accordingly ; that these arrangements were made, wholly, or in part, by obtaining from his sons and friends, promissory notes payable to himself, at distant periods ; and which he endorsed and delivered to certain creditors, to be held by them, and to be paid out of the sales of the property, so conveyed and assigned ; that some of these notes, to the amount of 5 or 6,000 dollars, were placed in the hands of *John Blagge*, upon a pretended trust, for certain creditors of *Comfort Sands*, with whom *Blagge* was wholly unacquainted, and from whom he had no authority to accept the notes ; that *Isaac Kibbe*, the assignee, was chosen by a majority of the creditors of *Sands*, and against the wishes of the respondents ; and in August, 1801, the respondents applied to *Kibbe*, for permission to use his name, in such proceedings at law, or in equity, as should be necessary for the creditors of *Sands* to obtain justice, and to have the property which had been fraudulently conveyed, or concealed, applied to the payment of his debts : and they offered, in case *Kibbe* would consent, to indemnify him against all costs and expenses ; but he declined doing any thing therein, and took no steps to get possession of the property so conveyed. The bill sought a dis-

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covery from *Comfort Sands* of his affairs ; and prayed that the property conveyed, assigned, or delivered to others, might be applied to the payment of the debts due to the respondents, and such other creditors as should come in and contribute, and be decreed entitled to participate with the complainants, and particular relief as to the other defendants, &c. An injunction was issued to prevent the appellants and *Robert Sands*, from conveying or disposing of the property, moneys, or securities which had belonged to *Comfort Sands*, and in their hands, or under their control, until the further order of the court.

Comfort Sands, in his answer, in the court below, denied that the conveyances above-mentioned, were made to defraud his creditors, or that any trust was expressed or understood for him, or that he had any design to secure the property to himself or his family ; he alleged that he acted as an agent for his son *Henry*, in relation to the *Brooklyn* estate ; that his object in the sale of his property, was to apply it to the payment of his debts ; and that he expected his son *Henry* would have been able to dispose of the property (with some benefit to himself) for the notes of *Comfort Sands* ; that the security he took from his sons was personal, but *bona fide* ; that he believed his sons would have been fully able to pay the notes, out of the property sold by them, as the notes were payable at different periods, so as to afford time for sales, without any sacrifice ; but that the sales had been prevented *by the injunction obtained by the respondents ; that some of the notes had been paid, but the greatest part still remained unpaid ; and that a further reason for his making the conveyances absolute, without any other security for the purchase-money, was to avoid having the property sacrificed at auction, under a sheriff's sale, for the benefit of particular creditors ; that at the time he paid the notes to his creditors, he had no intention of becoming a bankrupt. He also denied all collusion with his assignee, to prevent any suits being brought against him, or any knowledge of what passed between the respondents and *Kibbe* ; he alleged that the property in *James street* was conveyed to his brother *Robert*, in trust, to pay two notes, one to *John Jackson*, and the other to *David Smith & Co.*, and that the property was conveyed to *John Jackson* absolutely, without any trust whatever, and the notes taken up ; that he gave a full account of the disposition he had made of his property, before the commissioners ; he denied that the commission of bankruptcy was taken out collusively, and insisted on the benefit of his discharge under the bankrupt law.

Most of the other defendants answered, or disclaimed ; and the bill was taken *pro confesso*, against the rest.

Much testimony was taken in the cause, and many exhibits were read at the hearing ; but it is unnecessary to swell the case, by a detail of them, as the material facts, not above stated, are mentioned in the opinions of the court.

The cause was brought to a hearing, before the chancellor, in March, 1805, and on the 17th February, 1806, he pronounced the following decree:—

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“That the dwelling-house situate adjoining *Pine street*, in the city of *New-York*, with the ground thereunto belonging, or therewith used, mentioned in the pleadings of this cause, and also the dwelling-house in the *rear of the before-mentioned dwelling house, and situate adjoining *Cedar street*, in the said city, with the ground thereunto belonging, or therewith used, also mentioned in the pleadings of this cause, be respectively sold, by one of the masters of this court, at public auction, in the city of *New-York*, after giving at least *six weeks’ notice* of the time and place of such sale, in two or more of the public newspapers, printed in the city of *New-York*; and that out of the proceeds of the said sales, the said master pay *Samuel Jones* and *John Haring*, two of the defendants in this cause, the amount due to them on the mortgage, executed to them by the defendant, *Joseph Sands*, which mortgage is mentioned in the pleadings in this cause, together with their costs, to be taxed; the amount so due, on the said mortgage, to be ascertained by the said master, who shall sell the said premises, which, together with the amount of such taxed costs, the said master is to report to the court, with all convenient speed: And that the said master bring into court the surplus money, arising from such sales, to be distributed among the creditors of the said *Comfort Sands*, as shall be hereafter directed: And further, that the defendant *Lewis Sands* join with the said master, in the conveyances to be made of the said premises to the purchasers thereof, in fee simple; and that the defendants *Comfort Sands* and *Lewis Sands*, or one of them, deliver to the said master, the deed from the former sheriff of the city of *New-York* to *John Swartwout*, and the deed from the said *John Swartwout* to the said *Lewis Sands*, for the said houses and grounds so ordered to be sold, which are mentioned in the pleadings, or proofs in this cause; and that they, the said *Comfort Sands* and *Lewis Sands*, at the same time, and under oath, to be administered by the said master, if he thinks proper to administer the same, deliver unto the said master all the deeds, conveyances or assurances, in their or either of their hands or *power, relating to the said premises, or any part thereof, and that the said master deposit the said deeds, conveyances and assurances in the office of the assistant register of this court, in the city of *New-York*, to wait the further order of this court touching the same. And that the said *Samuel Jones* and *John Haring*, upon receiving the amount due to them on the said mortgage, with their costs to be taxed as aforesaid, shall either assign the said mortgage to attend the inheritance, or cause the registry thereof to be canceled, as the purchasers of the said premises shall elect: And it is further ordered, adjudged

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and decreed, that the defendant *Lewis Sands*, account before the said master, who shall sell the before-mentioned premises, for the rents and profits of the before mentioned houses and grounds, from the twenty-seventh day of *April*, in the year of our Lord one thousand eight hundred and one, (being the day when, according to his answer, and the proofs in the cause, he received a conveyance thereof from *John Swartwout*,) to the time the master shall sell the same, as herein-before directed: and that, in stating such account, the master make an allowance for all necessary repairs and improvements, permanently useful; and that in such account, the said *Lewis Sands* be charged by the master with the clear annual value of the said premises; and if, on inquiry, it shall appear to the said master, that the said *Lewis Sands* shall not, in fact, have received the rents and profits of the said premises, from the said *Comfort Sands*, for the whole or some part of the period, last aforesaid, the said *Comfort Sands* shall account for the said rents and profits, for such period as he has not paid the same to the said *Lewis Sands*, according to the aforesaid directions; and that the said master have power to examine the said *Lewis Sands* and *Comfort Sands*, on oath, in relation to said accounting, if he shall deem it proper; and it is in like manner ordered, *adjudged and decreed, that the defendant *Henry Sands* shall convey to *Thomas Cooper*, one of the masters of this court, by a competent deed or instrument in the law, to be devised and settled by the said master, all and singular, the lands, tenements and hereditaments, and real estate, situate at *Brooklyn*, in *King's* county, which were conveyed to the said *Henry Sands*, by the defendant *Comfort Sands*, by the deed or conveyance, mentioned in the pleadings of this cause, bearing date on or about the ninth day of *July*, in the year of our Lord one thousand seven hundred and ninety-eight, excepting such parts of the said lands, tenements, or real estate, as the said defendant *Henry Sands* conveyed unto the said defendant *Comfort Sands*, by a deed or conveyance, bearing date on or about the fifteenth day of *September*, in the year of our Lord one thousand eight hundred and one, and which appeared in proof at the hearing of this cause; and excepting also such other parts or portions of the said lands, tenements, hereditaments and real estate, as may have been heretofore, and since the said conveyance from the said *Comfort Sands* to the said *Henry Sands*, sold and conveyed by the said *Henry Sands* to any other person or persons *bona fide*, and for valuable consideration, before the thirteenth day of *November*, in the year of our Lord one thousand eight hundred and one, the day on which the bill in this cause was filed; and excepting further, such parts or portions of the said premises, as have been or may be hereafter and before such conveyance from the said *Henry Sands* to the master shall be executed, sold unto the decretal order of this court, to satisfy the mortgage on the said premises, given

by the said *Comfort Sands*, and held by the president, directors, and company of the bank of *New-York*; such conveyance from the said *Henry Sands* to the master as is hereby intended and directed, is to embrace all that part of the said real estate and premises, *which, on a partition between the defendant *Henry Sands* and *Joshua Sands*, fell or was assigned to the said *Henry Sands*, as the grantee of the said *Comfort Sands*, as in the pleadings mentioned; and to the end that it may be known how much and what parts or portions of the said real estate, situate at *Brooklyn*, and mentioned in the pleadings in this cause, are to be thus conveyed by the said *Henry Sands*, to the master in conformity to this order and decree; the said *Henry Sands* shall state to the said master, upon oath, if required, the particular parts or portions of the said lands, tenements and hereditaments which have been conveyed by him, the said *Henry Sands*, which are embraced or fall within the second exception before expressed; and the person or persons to whom such conveyance or conveyances was or were made, and the time or times when, and the consideration for each lot or parcel so conveyed, and whether the consideration moneys have been paid, and if not, when payable and how secured: And it is further ordered, adjudged and decreed, that the defendant *Henry Sands*, before, or at the time of executing such conveyance to the master, as is hereby directed, of the said lands, tenements and hereditaments, situate at *Brooklyn*, shall deliver unto the said master the said deed from the said *Comfort Sands* to the said *Henry Sands*, dated on or about the ninth day of *July*, in the year of our Lord one thousand seven hundred and ninety-eight, in the pleadings mentioned, and also the deed or instrument of the partition made of the real estate situate at *Brooklyn*, between the said defendant *Henry Sands*, as grantee of the said *Comfort Sands*, and *Joshua Sands*, in the pleadings in this cause mentioned; and also all other deeds, conveyances or evidences of title, and all leases made thereof, or any part or parts thereof, and also all maps of the said lands, tenements or hereditaments, situate at *Brooklyn*, in the hands, possession or *power, of the said *Henry Sands*; and that the said master have power to examine the said *Henry Sands*, on oath, if he thinks proper, touching such deeds or other evidences of title as are hereby directed to be delivered by him, the said *Henry Sands*, to the said master: And it is further ordered, adjudged and decreed, that the defendant *Henry Sands* account before the said master on oath, for the proceeds of the sales of every part of the said lands, tenements and hereditaments, situate at *Brooklyn*, aforesaid, which were conveyed to him by the said *Comfort Sands*, by the deed or conveyance mentioned in the pleadings in this cause, bearing date on or about the ninth day of *July*, in the year of our Lord one thousand seven hundred and ninety-eight, excepting so much thereof as has already or may hereafter be sold, under

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the decretal order of this court to satisfy the mortgage, on the same premises, held by the president, directors and company of the bank of *New-York*, and excepting also so much thereof as the said *Henry Sands* reconveyed to the defendant *Comfort Sands*, by the aforesaid deed, bearing date on or about the fifteenth day of *September*, in the year of our Lord one thousand eight hundred and one, or such part of the last-mentioned portion as the said *Comfort Sands* shall actually convey to the master as hereafter directed; that in such account the said *Henry Sands* be charged with all the said real estate, or such parts thereof as have been sold or conveyed, between the said ninth day of *July*, in the year of our Lord one thousand seven hundred and ninety-eight, and the thirteenth day of *November*, in the year of our Lord one thousand eight hundred and one, according to the real and true value of the property, at the times of selling and conveying the same; and also that the said *Henry Sands* account, on oath, if required, for the rents and profits of all the said real estate conveyed to him by the said *Comfort Sands* as aforesaid, from the said *ninth day of *July*, in the year of our Lord one thousand seven hundred and ninety-eight, in which account the said *Henry Sands* shall be charged with the clear annual income of the said lands, tenements and hereditaments; but with respect to those parts of the said real estate, which have been or may be sold by virtue of a decretal order of this court, to satisfy the said mortgage held by the president, directors and company of the bank of *New-York*, the account of rents and profits is to be taken only till the times of such sales respectively; and the said master, in taking the said accounts, shall allow the said *Henry Sands*, by way of discharge, all such sums as may have been applied by the said *Henry Sands* towards discharging the said mortgage to the president, directors and company of the bank of *New-York*, or the payment of other *bona fide* debts contracted by the said *Comfort Sands*, and which were due from him, and actually paid by the said *Henry Sands* out of the said sales, or out of the said rents and profits, on or before the fourth day of *April*, in the year of our Lord one thousand eight hundred; and for all necessary repairs and improvements permanently beneficial: And it is further ordered, that the said master report the result of the said accounting by the said *Henry Sands*, to this court with all convenient speed: And it is further ordered, adjudged and decreed, that the defendant *Comfort Sands* convey to the aforesaid master, by a competent deed for that purpose, to be settled by him, all and singular, that part of the said real estate, situate at *Brooklyn*, mentioned in the pleadings in this cause, which was conveyed by the defendant *Henry Sands* to the said *Comfort Sands*, by a deed bearing date on or about the fifteenth day of *September*, in the year of our Lord one thousand eight hundred and one, which appeared in the proofs in this cause, excepting, however, so much of the said

last-mentioned premises, as the said *Comfort Sands* *shall have *bona fide* sold and conveyed to any person or persons, previous to the thirteenth day of *November*, in the year of our Lord one thousand eight hundred and one, which sales and conveyances are to be ascertained by the said master, and touching which he may examine the said *Comfort Sands*, on oath, if he thinks proper; and further, that the said *Comfort Sands*, at the time, or before he makes the said last-mentioned conveyance, shall deliver to the said master the said deed from the said *Henry Sands* to him, bearing date on the said fifteenth day of *September*, in the year of our Lord one thousand eight hundred and one, and all other deeds or evidences of title relating to the said last-mentioned premises, and all leases of the same or any part thereof, and all maps of or relating thereto, which are in the possession, power, or under the control of the said *Comfort Sands*; and this under the oath of the said *Comfort Sands*, if the said master shall think proper: And it is further ordered, adjudged, and decreed, that the said defendant *Comfort Sands*, account before the said master for all moneys arising from the sales, conveyances and dispositions of the said lands, tenements and hereditaments, situate at *Brooklyn*, and conveyed by him to the defendant *Henry Sands*, as mentioned in the pleadings in this cause, and which have been sold, conveyed or disposed of by the said *Comfort Sands*, after the said ninth day of *July*, in the year of our Lord one thousand seven hundred and ninety-eight, and before the said thirteenth day of *November*, in the year of our Lord one thousand eight hundred and one, or the proceeds whereof have been received or disposed of by the said *Comfort Sands*, or to his use; and that in that account the said *Comfort Sands* be charged with the real and true value of the said premises, sold, conveyed or disposed of as aforesaid: And that the said master also have power to examine the said *Comfort Sands* on oath, touching the said last-mentioned *account, if he thinks proper: And it is further ordered, adjudged and decreed, that the said *Comfort Sands* account before the said master for the rents and profits of all and singular the said lands, tenements and hereditaments, situate at *Brooklyn*, and which were conveyed by the said *Comfort Sands* to the defendant *Henry Sands*, by the aforesaid deed, bearing date on or about the ninth day of *July*, in the year of our Lord one thousand seven hundred and ninety-eight, which have been received by or to the use of the said *Comfort Sands*; and also for the rents and profits of the said real estate, or so much thereof as may have been leased out by, or has been in the possession of, the said *Comfort Sands* since the day of the date of the said conveyance to the said *Henry Sands*; in which account the said *Comfort Sands* is to be charged with the clear annual income of the said premises, to be ascertained by the said master, and to be allowed for all necessary repairs, and

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for improvements permanently beneficial; and that the said master have power to examine the said *Comfort Sands* upon oath, touching the account for the rents and profits last aforesaid: And it is further ordered, adjudged and decreed, that the said master shall forthwith, after obtaining the same, file in the office of the assistant register of this court, in the city of *New-York*, all deeds, conveyances and evidences of title, and maps of the said lands, tenements and hereditaments, situate at *Brooklyn*, which shall be delivered to him by the said *Henry Sands* and *Comfort Sands*, in pursuance of the directions hereby given for that purpose, with a schedule describing the same, there to await the further order of this court; and that the said master report to this court, with all convenient speed, the accounts of the said *Henry Sands* and *Comfort Sands*, herein before directed to be taken: And it is further ordered, adjudged and decreed, that the said master receive from the said defendants *Henry Sands* and *Comfort *Sands*, the conveyances of the said lands, tenements and real estate, situate at *Brooklyn*, herein before directed to be made in trust, to be sold; and that the said master sell the same at public auction in the city of *New-York*, in such parcels or portions, as he may think proper; giving at least *eight weeks'* notice of the time and place of each sale; and that the said master, together with the defendants *Comfort Sands* and *Henry Sands*, and all other proper parties, to be ascertained by the said master, convey the said premises to the purchasers thereof in fee simple; that the said master bring the money arising from the said sales into this court, to be distributed among the creditors of the said *Comfort Sands* as shall be hereafter directed: And it is further ordered, adjudged and decreed, that the slaves, household furniture, and other personal property which belonged to the defendant *Comfort Sands*, and which were sold by the sheriff of the city and county of *New-York*, under an execution, and purchased by the defendant *Nathaniel Prime*, and by him left in the possession of the said *Comfort Sands*, as in the pleadings in this cause mentioned, be delivered to the said master, and by him sold at public auction, first giving public notice of the time and place of such sale; and that the said master bring the proceeds of the said last-mentioned sales into this court, to be distributed among the creditors of the said *Comfort Sands*, as shall be hereafter directed; and that the said *Nathaniel Prime* and *Comfort Sands* inform the said master upon oath, of the particulars of the said slaves, household furniture, and personal property, so purchased at the sheriff's sales by the said *Nathaniel Prime*; and if the same or any part thereof shall not be delivered to the said master, in pursuance of this order, by reason of having been since sold *bona fide* to any third person, or by reason of having been worn out, consumed or destroyed, that the said *Comfort Sands* account before *the said master for the value thereof, or so much thereof as shall not be delivered.

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ered to the said master for the reasons aforesaid ; and that the said master report to this court the amount of the said sales, and of the account last directed : And it is further ordered, adjudged and decreed, that it be referred to one of the masters of this court, to ascertain and report to this court, whether any, and what parts or portions of the said real estates, situate at *Minisink* and *Schaticoke*, mentioned in the pleadings in this cause, have been conveyed by the said *Henry Sands*, before the fourth day of *April*, in the year of our Lord one thousand eight hundred, to the *bona fide* creditors of the said *Comfort Sands*, in satisfaction or towards satisfaction, of the said creditors' demands ; and when, and to whom, and whether any, and what parts or portions of the said last-mentioned real estates have been sold or conveyed, or agreed to be conveyed by the said *Henry Sands*, either after the said fourth day of *April*, in the year of our Lord one thousand eight hundred, or to persons *bona fide* creditors of the said *Comfort Sands*, and in satisfaction or toward satisfaction of their demands ; and when, and to whom, and for what considerations, and whether such consideration money has been paid, and when and to whom, and if not paid, then whether secured to be paid, and by whom, and to whom, and in what manner ; and also to inquire whether the title to any, and what parts or portions of the said last-mentioned real estates remain in the said *Henry Sands* or *Comfort Sands*, and how much in particular, and the value thereof, and that the said master have power to examine the said *Henry Sands* and *Comfort Sands* on oath, touching the premises hereby last referred to him, and that he report thereon to this court with all convenient speed : And it is further ordered, adjudged and decreed, that it be referred to one of the masters of this court to ascertain and report to this court, whether *any, and what parts or portions of the said real estates situate at *Washington*, in the territory of the *United States*, mentioned in the pleadings in this cause, have been conveyed by the said *Lewis Sands*, before the fourth day of *April*, in the year of our Lord one thousand eight hundred, to the *bona fide* creditors of the said *Comfort Sands*, in satisfaction, or towards satisfaction of the said creditors' demands ; and when, and to whom, and whether any, and what parts or portions of the said real estates have been sold or conveyed, or agreed to be conveyed, by the said *Lewis Sands*, either after the said fourth day of *April*, in the year of our Lord one thousand eight hundred, or to persons not *bona fide* creditors of the said *Comfort Sands*, and in satisfaction, or towards satisfaction, of their demands ; and when, and to whom, and for what consideration, and whether such consideration money has been paid, and when, and to whom, and if not paid, whether secured to be paid, and by whom, and to whom, and in what manner ; and also to inquire whether the title to any, and what parts or portions of the said last-mentioned real estates remain in the said *Lewis Sands* or *Comfort Sands*, and how much in particular and

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the value thereof; and that the said master have power to examine the said *Lewis Sands* and *Comfort Sands*, on oath, touching the premises hereby last referred to him, and that he report thereon to this court with all convenient speed: And it is further ordered that a feigned issue or issues be made up in the Supreme Court of this state, to be tried by a jury in the city and county of *New-York*, at any sittings or circuit court there, to be hereafter held, to ascertain by the verdict of such jury, when the indenture or deed bearing date on the thirteenth day of *November*, in the year of our Lord one thousand seven hundred and ninety-six, mentioned in the pleadings in this cause to have been given by the defendant *Comfort Sands*, to his daughter **Sarah Maria Sands*, for a lot of ground adjoining *Greenwich street*, in the city of *New-York*, was executed; and whether the said *Comfort Sands* had not the said deed in his custody or power after the execution thereof; and whether the said *Comfort Sands* did not receive the rents and profits, or exercise other acts of ownership over the said lot of ground, after the date of the said deed; and whether the said *Comfort Sands* was not, at the time of executing and delivering the said deed, largely indebted; and that the parties respectively be at liberty to read and offer in evidence, on the trial of the said issues, the pleadings and proofs in this cause; and to offer also on the said trial any other or further evidence: And it is further ordered, that the complainants in this cause have their option either to make up and carry down the said issues to trial, or that their bill as to the said lot of ground be dismissed: And it is further ordered, that all further directions be reserved until the coming in of the master's reports, or the further order of this court."

From this decree an *appeal* was entered to this court.

The reasons for the decree were thus given by

THE CHANCELLOR. The right of the complainants generally to sustain this bill was questioned, on the ground that they had not made out a lien on the property of the bankrupt; and they referred their right to a period anterior to 1797, before which they allege their debts accrued.

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In a former stage of this cause before me, the complainants' bill was demurred to, by some of the defendants, because some of the complainants, claiming to be creditors, had not proved or offered to prove their debts before the commissioners of bankruptcy; and this cause of demurrer was sustained, because no privity was made out between the *assignee* and a *creditor* at large, who had no particular claim on the fund, that **he* might, or might not, resort to it; but that until he did, it could not appear that he had an interest in its increase or application.

The same objection, at a subsequent hearing, was repeated, as to others of the complainants; but it was admitted in argument, and there was some evidence to that effect, that the com-

plainants, without distinguishing which, and the amount of their different interests, were entitled to about 12,000 dollars under the commission.

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The bill is of a somewhat peculiar complexion; for if the complainants have a right to maintain it, that right exists in them, both collectively and individually, though they profess to exert it for the benefit of all who shall ultimately appear entitled as creditors to share the general fund. How that fund was to be finally disposed of, was made a subject for my consideration. It is sufficient for all equitable purposes, that some have entitled themselves as creditors; and that the competency of the others to become parties, has been tacitly admitted by the defendants, by their submitting to answer. And so far as respects the creditors proving themselves such under the commission, they may be well likened, as has been done in a recent case, (*Ex parte Stokes*, 7 *Vesey*, jun. 408.) in the *English Court of Chancery*, to creditors on execution, for the commission is in the nature of an execution as to all the creditors; and an effectual *lien* is created by the commission for their benefit.

It was objected that the bill, in its present form, could not be maintained, because the complainants could not be admitted to substitute themselves for the assignees. This objection did not appear to be much relied on; and I thought it could not admit of a doubt, that if they were interested in this fund, intrusted to the management of the assignee, and the latter neglected or refused to do the duties legally imposed on him, the creditors might pursue their interests, by filing a bill at the peril of costs.

*Another objection as to the mode of proving the bankruptcy, and the circumstances constituting it, was taken by all the defendants, who have not admitted the bankruptcy.

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The 56th section of the bankrupt law provided, that in all cases where the *assignees* should prosecute any debtor of the bankrupt, for any *debt*, *duty* or *demand*, the commission, or a certified copy thereof, and the assignment of the commissioners of the bankrupt's estate should be considered as conclusive evidence of the issuing of the commission, and of the person named therein, being a trader and bankrupt, at the time mentioned therein.

A certified copy of the commission of bankruptcy, and of the assignment of the bankrupt's estate, were given in evidence in the cause.

Two difficulties were stated; the one relating to the complainants; the other, to the defendants.

It was urged that this section merely related to the assignee; but the assignee represents the interest of the creditors collectively, and whether the assignee sues himself, or, in consequence of his *laches* or *fault*, devolves the execution of some of his functions on his creditors, it ought not to vary the rule of evidence. The interest pursued is the same. The per-

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sons prosecuting for it are the same, under a different description. Their relation to the defendants is precisely the same, as to the objects pursued; and it appeared to me to be clearly within the reason of the statute, which was to prevent the debtors of the bankrupt from sheltering themselves under the subtlety of forms, to defeat a recovery.

A case was cited from *Douglas*, (*Doug.* 203.) and another from the Supreme Court of this state; (1 *Caines*, 588.) but I did not consider them as having any analogy to the present.

*The other part of the objection respected the defendants.

Debts originate in express compact, or by the act and operation of law. Thus, at common law, an action may as well be maintained on an *implied*, as an express contract. A *tort* may be waived, and resort be had to the *assumpsit*.

The words are *debt*, *duty* or *demand*. A debt may be created by the unjust appropriation of the chattel of another. The word *demand* is the most comprehensive in its import that technical language affords, as to debts or duties; and for the purpose of promoting substantial justice, there can be no insurmountable restraint to extend it so far as to embrace real estate, and to consider an inequitable appropriation of it as creating an equitable demand, equivalent to a debt by implication of law. The word debtor seems to have been intended as a correlative to the words *debt*, *duty* or *demand*; and hence I was of opinion that it might well be maintained, that if the defendants had fraudulently possessed themselves of the property of the bankrupt, they ought to be held debtors, by fraud, which no refinements or legal subtleties ought to screen from the justice of the court; and whose powers are always exerted to defeat it. The general objections to maintaining the bill, appeared to me not sustained.

As to the merits, the case presented a complicated machinery, the precise relations of the different parts of which it was not easy to discover, or unfold, though its effects were too obvious to be mistaken.

A man reputed to be of large property, possessed of an ample real and personal estate, involved in debt beyond his ability to pay, deliberately professes an intent to favor his friendly creditors at the expense of others whom he deems unfriendly; distributes by conveyances, to which the different members of his family are subscribing *witnesses, a large proportion of his property among his children, and others, none of whom are creditors, and some of whom were confessedly incompetent to pay, unless enabled so to do, by the production of the subjects conveyed. These, however, instead of selling, leave him in the enjoyment of some of it, in the perception of the rents of other parts, continuing to exercise acts of ownership at different periods, indicating an absolute and unrestrained control, and leaving the debts of both classes of creditors unsatisfied

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This is the general aspect of the transaction. Its particular details require a more minute investigation.

The most material question between the parties does not arise between contending creditors as to preference. It is between creditors, and those who are alleged to hold by fraud.

Previous to the statute of bankruptcy, no law existed imposing it as a duty upon an insolvent to make an equal distribution of his estate among his creditors, unless on a process instituted at his own instance. The field of competition was therefore left open for the most vigilant and active, to secure preferences in the payment of *bona fide* debts, and if fairly acquired, they could not, unless affected by the usual badges of fraud, be defeated.

The obligation of the debtor sacredly to devote the whole of his property to the payment of his debts, was, however, from that circumstance, not the less imperative. The bankrupt law made no difference in this respect, but by enforcing the equality of satisfaction, in cases of bankruptcy, and furnishing in some cases, more determined tests of frauds practised in evasion of its provisions.

Thus it has been held, that the *English* statutes against fraud were merely in affirmance of the common law, and that, without their aid, the suppression of the frauds, *thereby intended to be restrained, might have been effected.

The first conveyance in order of time, is that of the 30th of November, 1796, from *Comfort Sands* to his daughter *Sarah Maria Sands*, for a house and lot in *Greenwich street*. She having died subsequent to the bankruptcy, the defendant *Comfort Sands* held the property, as her heir.

The bill fixes the time of *Comfort Sands's* insolvency to a period prior to 1797; and his answer limits it to the latter end of that year.

The deed bears date the 22d day of November, 1796, but it was made a question between the parties when it was delivered. This was an essential ingredient in the case, and both parties on the argument concurred in the suggesting that it was a proper point for an issue. I therefore directed an issue, in conformity to the wishes of the parties.

The next transaction relates to the judgment and execution of *H. and S. Johnson*. [Here his honor stated the facts.]

These answers made out a case, from the parties' own showing, which rendered a recurrence to the depositions generally unnecessary; but that of *John Swartwout*, a principal actor in this transaction, throws a great degree of light on the subject, and explains some points which the answers had not fully disclosed. He states that he made the purchase at the request of the defendant *Comfort Sands*; that the inducement held out to him was his indemnification against the responsibilities he had incurred for the defendant *Comfort Sands*; and that *H. and S. Johnson*, the plaintiffs in this suit, on which the execu-

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tion issued, would furnish the means of paying for it; that in the months of *February* and *March*, 1801, the defendant *Comfort Sands* applied to the witness, and requested him to convey those houses and *lots to the defendants *Robert Sands* or *Lewis Sands*; that he hesitated respecting it, as it might involve him in responsibilities with the commissioners of bankruptcy; that *Comfort Sands* afterwards told him, that upon making such conveyance to his son *Lewis Sands*, he would give his note for the amount of the purchase money, which note he would dispose of to some of his creditors, in satisfaction of his debts, and make a fair statement of it to the commissioners; that the said *Comfort Sands* had a considerable time before reimbursed him for the responsibilities he had incurred for him; that he made the conveyance to the defendant *Lewis Sands*, and took his note payable to *bearer*, for the consideration money, and then redelivered the said note to *Comfort Sands*.

The sale by the sheriff to *John Swartwout*, was clearly in trust for the defendant *Comfort Sands*; for from his answer it is to be collected that the sale was not intended to divest him of his property in the houses and lots, but that it was merely colorable; for though *H. and S. Johnson* had the debt alleged to be due to them, in the first instance, secured by judgment, they agreed to take their own notes, and the note of *Comfort Sands* for 2,500 dollars, which they had endorsed; and for which sum they must either have continued as endorsers, or have received it, on the credit of the maker only, in payment.

Besides, it could not have conduced to their effectual indemnity against the responsibilities they had incurred, unless the property had sold so much under value, as those responsibilities amounted to, or unless the fund to pay for it was to be furnished by the defendant *Comfort Sands*.

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These were strong indications of views inconsistent with the professed objects of the purchase, and of premeditated *evasion, which forcibly corroborated the evidence of *John Swartwout*.

That deposition disclosed, that not a cent was paid on the first purchase to the sheriff; that the notes applied to its payment were provided by the defendant *Comfort Sands*, with the approbation of *H. and S. Johnson*; that the whole transaction was suggested and arranged, by the defendant *Comfort Sands*, so as to be in perfect subserviency to his views; that though the responsibilities for indemnifying *H. and S. Johnson*, which induced the sale, were satisfied, the property was held by *John Swartwout*, until the defendant *Lewis Sands* acquired a conveyance; and that when that conveyance was made, no money was paid.

All these circumstances left no doubt, in my mind, that the defendant was the *cestuy que trust*; and that until the convey

ance was made, *John Swartwout* held as his trustee. It followed, that the estate passed by the assignment of the bankrupt's estate, as the bankruptcy related to the 21st of *March*, 1801, and the conveyance to the defendant *Lewis Sands* was not made till the 27th of *April*, in that year.

When the explanations contained in the depositions of *John Swartwout* were taken into consideration, and compared with the answers of the defendants, no doubt could remain, but that this was a contrivance of the defendant to evade the provisions of the bankrupt law ; that it originated in fraud, which accumulated in every subsequent step in the progress of these transactions.

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The furniture and some other articles of personal property of the defendant *Comfort Sands*, were sold by virtue of the same execution ; and *Nathaniel Prime*, his son-in-law, became the purchaser for 1,371 dollars and 38 cents ; for which sum the defendant *Comfort Sands* says that *Nathaniel Prime* gave his note, and which he supposed he paid. *Prime*, in his answer, admits that he purchased *the furniture and two slaves, for which he either paid or gave his note, which he afterwards paid ; and he denies that either *Comfort Sands*, or any other person on his account, furnished the money to pay for them, then, or at any time since. They both concur in stating that *Comfort Sands* has ever since possessed the furniture, some part of which *Comfort Sands* says was carried over with him to *Long-Island*, during his confinement, and the remainder was left with him at his house in *Pine street* ; and when he returned, he used it, and continued so to do, as a personal accommodation to him from *Nathaniel Prime*, who says, that it is his property, and that he merely lent it to *Comfort Sands*, from motives of friendship.

The only question arising on this subject was, whether leaving the furniture in the possession of *Comfort Sands* was not within the purview of the bankrupt law.

The 27th section of the bankrupt law (*L. U. S. v. 5. p. 63.*) enacts, "that if any person shall become bankrupt, and at such time, by consent of the owner, have in his or her possession and disposition any goods, whereof he or she shall be reputed owner, and take upon him or herself the sale, alteration or disposition thereof, as owner, the commissioners shall have power to assign the same, for the benefit of the creditors, as fully as any other part of the estate of the said bankrupt."

The statute of 21 *Jac. I. c. 19. s. 11.* contained a similar provision ; and the exposition it has received in *England* may be of use in the construction of our bankrupt law. As to all the intents in which the 27th section of the latter is material, in the present question, it is a transcript of the former.

In the case of *Mace and Cadle*, (*Cowp. 232.*) Lord *Mansfield*, in delivering the opinion of the court, lays it down, as deduced from the noted case of *Twine*, (*Co. Rep. 81.*) that if

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a man conveyed his own goods to another, and kept the possession, such possession would have been void, as fraudulent, *even before the statute of *frauds*. He adds, that it does not extend to the case of *factors* or *goldsmiths*, who have the possession of other men's goods merely as trustees; but the goods must be such as the party suffers the trader to sell as his own.

This opinion rather narrows the doctrine in *Twine's* case, as it required the exertion of the power to sell to constitute the possession fraudulent.

The case of *Lingham v. Biggs*, (1 *Bea. and Pull.* 82.) is, in many leading points, analogous to the present. There the goods, consisting of furniture, were taken in execution; valued by the sheriff; a bill of sale made according to the valuation, to the plaintiff's brother, in trust, for the plaintiff; articles of agreement entered into with the original owner, by which she stipulated to pay yearly 27*l.* for four years, and covenanted not to remove them without the plaintiff's consent. After the four years, the original owner became a bankrupt, and the goods were seized under the commission. The doctrine on this subject was fully examined. The distinction attempted to be taken between merchandise and furniture, was held not to be supported; and that by the fair construction of the statute, the reputed ownership was the true test for determining the case; for from that reputed ownership the false credit arises; and from that the mischief intended to be guarded against; the other terms of the section being incidental to reputed ownership. This appears to me a sound construction. The several cases cited in the argument were considered in that case; and I thought the doctrine attempted to be deduced from them, as applicable to this case, explained and distinguished with great legal discernment; and on the reasoning of that case, I was of opinion, that the furniture and other articles in possession of *Comfort Sands*, at the time of his bankruptcy, passed by the assignment.

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*It was urged, that the public sale, in this case, was favorable to its validity; but whether a bankrupt sells directly, or employs circuitous means to effect the same object, cannot otherwise vary its complexion, than by furnishing additional motives for suspicion, from the extraordinary precautions resorted to. The judgment and execution appear to have been throughout, under the control of the defendant *Comfort Sands*, and solely used to promote his views, and subserve his convenience; and hence, even independent of the positive provisions of the bankrupt law, as to him, this might well be considered as part of the same system of conduct; for from the intrinsic circumstances of the transaction, as described, in the concurrent answers and deposition of *John Swartwout*, it seems almost incredible, that while the real estate was thus disposed of, the furniture, which both the defendants *Comfort Sands* and *Nathaniel Prime* agree in representing as having been purchased for the personal accommodation of *Comfort Sands*, should

have been paid for by *Nathaniel Prime*, without some secret understanding, that it would be reimbursed on disclosing the object of the sale. Either this was the case, or the defendant *Comfort Sands*, in violation of every honest feeling, extorted money from a person disposed to serve him from friendly motives, under a colorable pressure, contrived by his own devices, and to answer his fraudulent purposes, and applied the money thus obtained to his own use; but in whatever point of light it may be placed, it cannot support the sale.

The *Brooklyn* property was conveyed in *July, 1798*; of consequence, prior to the passing of the bankrupt law. [Here his honor recapitulated the pleadings and evidence relative to the disposition of this estate.]

The defendants *Comfort* and *Henry Sands* concur in stating, that *Henry Sands* had not the means of paying *for this estate, unless from the produce of the sales. By *Robert Lenox* he is described as a member of his father's family, not worth much; and by *Joshua Sands*, as either a student at law, or an attorney recently admitted, having no property of any considerable value.

The relation between the parties; the inability of the son to pay; the useless precaution of preceding the conveyance, intended to be consummated in a few days, by a contract; the anticipation of a year's interest in the calculation of the value; the satisfying the money to be paid by the terms of the contract, out of the rent of the land conveyed, combined with the pretences under which the conveyance was made, which the defendant *Comfort Sands* alleged was to raise a fund which might with greater facility be applied to the payment of his debts; and to enable the defendant *Henry Sands*, by laying out the property into lots and selling them to obtain some compensation for his trouble in settling the mortgage, and the mode of management after the conveyance made, are calculated not only to excite, but to make the most forcible impressions to confirm, suspicion. When all these circumstances were reviewed in detail, and analyzed, each of them seemed to acquire additional force from the dissection.

The relation of father and son, generally, involves an intimate union of views and interests. These may be discordant, and not unfrequently are so; but in this instance, it is evident, that there was the most perfect coincidence in these particulars. One of the professed objects of the sale was to call into action, the activity and discernment of the son, by parceling out and selling the estate, and to give him a reward commensurate to his exertions by those means; and yet as soon as the operation of selling commences, the father is admitted to be better qualified to make proper dispositions, as being better acquainted with the relative value of the different *parts. The son had no funds to pay the sum payable beyond the amount of the mortgage, and in this respect the matter is so arranged as entirely to exempt him from paying any part of it;

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for the principal sum due on the mortgage is stated to be 50,000 dollars ; and a year's interest was due on the mortgage on the first day of the same month of *July*, in which the contract and conveyance were made. Another year's interest was anticipated ; and the remaining 4,000 dollars were received out of the produce of the estate thus professed to be sold, upon the settlement of the accounts with *Joshua Sands*.

The contract was another singular trait in this transaction. It is dated on the 5th of *July*, four days before it was intended the conveyance should be made. This, in the situation of the parties, was worse than useless. Every circumstance disclosed, showed that a perfect confidence existed between them. *Comfort Sands* had nothing to acquire ; and it was, by his own account, principally intended as a benevolence to *Henry Sands*. No reciprocal but adverse interests, which it is generally the purpose of contracts of this kind to reconcile and secure ; no precise rights or duties, as equivalent to each other, to adjust ; no difficulty in settling the terms can even be presumed ; and the time allotted for its consummation so short, as to leave little at hazard, from the common contingencies of life.

This over caution is one of the settled *indicia* of fraud. It evinces a diffidence in the rectitude of the transaction, and excites a correspondent solicitude to provide defences for its protection.

After the conveyance was executed, another series of acts was presented, further developing the intent of the parties. [Here his honor stated the acts and transactions relative to the *Brooklyn* estate.]

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*I forbear to enumerate such other instances as are susceptible of some explanation on the part of the defendants, reconcilable to their pretences ; but those already intimated, show a general interference in the management of the property, and repeated and unequivocal acts of ownership.

These taken in connection with the reasons alleged for conveying the property, left no doubt, in my mind, that the whole of this business respecting the *Brooklyn* estate was a *trick*, and not a *bona fide* conveyance.

I have not adverted to the value of the property. It is sufficient that it is of a value worth the pursuit of the creditors ; and the contingent rise of value, if they have been unjustly deprived of it, is as much a positive loss to them, as if the value had remained stationary, and it had originally been so much undervalued.

It, however, appears, by the answers of *Comfort* and *Henry Sands*, that it was of greater value at the time of the conveyance, than the money professed to have been intended to be paid for it ; and *Joshua Sands*, who, from his interest in and connection with the property, was, perhaps, the most competent to make a correct estimate, valued it at 75,000 dollars at the time of the conveyance. Other witnesses differ ; but none

value it at less than 60,000 dollars ; which, whatever rule of calculation is adopted, will exceed the amount of the purchase money considerably. For the 3,000 dollars were clearly an anticipation of a year's interest ; and the 4,000 dollars, by the terms of the contract to be paid in cash, was so paid as not to require a cent to be advanced ; and though several unforeseen circumstances might have contributed to enhance its value more rapidly than was calculated upon, it was, from the whole evidence exhibited in the cause, in a state of gradual increase, so as to yield a *moral certainty to the purchaser, of a handsome profit in a short period.

On a view of the whole subject, I was of opinion, that this conveyance, as against the creditors, must be deemed fraudulent and void. There were, however, circumstances disclosed, which rendered it convenient to consider it as a link in the chain of derivative title from *Comfort Sands*. The complainants were not disposed to question the partition, which, for aught that appears, was fairly and equally made. Sales were made to *bona fide* purchasers ; and the purchase money paid into the bank of *New-York*, in exoneration of the estate, generally ; and those payments, the complainants conceded, were not to be disturbed ; and others who might claim under it, and who were not parties to this suit, could not and ought not to be deprived of the rights they supposed themselves entitled to, without having an opportunity of defending them.

I, therefore, thought the better mode would be to direct a sale of the property not so disposed of, and to decree that *Comfort* and *Henry Sands* should join with the master in the conveyance ; but it would have been less embarrassed in the detailed manner of selling calculated to make it most productive, if the title had been vested in the master, and by him transferred to the purchasers.

All the other transactions, relating to the estate of *Comfort Sands*, and between the same parties, must of course have received some taint from the fraud existing in this particular instance.

The intent expressed by *Comfort Sands* applied to all. The general circumstances of the parties continued the same throughout. Their answers as to the *bona fides* of the sales were falsified. The pretence of payment from the funds of *Henry Sands* was not maintained in any part.

*The estate of *Comfort Sands* at *Schaticoke* was the next object presented for consideration. [Here his honor stated the facts relative to this estate.]

If the conveyance in 1799, to *Elias Nixen*, was for a *bona fide* debt, I have already given my reasons for supposing it valid. The defendant *Elias Nixen*, in his answer, shows an existing debt due to him from *Comfort Sands*, and that the conveyance by *Henry Sands* to him was made in satisfaction thereof. This answer is not impeached or disproved ; it was

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before the passing of the bankrupt law; and of consequence there was no legal restraint on a fair preference.

Though *Peter Kemble*, the surviving partner of *Gouverneur & Kemble*, was made a party to the bill, neither the bill charged, nor the answer disclosed, any circumstance respecting the satisfaction of their debt, by the conveyance from *Henry Sands* to them. It was, therefore, as to him, not within the purview of the bill.

Jesse Oakley is not a party; but the exchange of the notes mentioned by the defendant *Henry Sands*, for the bond by him executed to *Comfort Sands*, was expressly done to enable the latter to satisfy some of his creditors, in preference to others equally entitled, and in contemplation of bankruptcy, and, therefore, in evasion of the provisions of the bankrupt law.

This, therefore, was considered as void, as between *Comfort* and *Henry Sands*; and as *Henry Sands* was to be held as trustee for *Comfort Sands*, in the disposition of this property, he was required to account for the one fifth of the purchase money received on his contract for the 801 acres; and I was of opinion that he should be decreed to convey the lands undisposed of towards the satisfaction of the creditors mentioned in his answer. As the extent, situation and amount of these could not be satisfactorily collected from the answer, it was referred to a master to ascertain those circumstances.

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*The deposition of *George Tibbits* went to show the exercise of acts of ownership of *Comfort Sands*, as to the *Schaticoke* property, after the conveyance to *Henry*; but on the ground I have taken, in my view of the subject, it could not have much influence on the question.

The *Minisink* property was charged to have been conveyed by *Comfort Sands* to *Henry Sands*, for the consideration of 1,000 dollars. [Here his honor stated the facts relative to this estate.]

As far as those lands were destined to the satisfaction of existing debts, and were so applied, there could be no pretence for disturbing the title thus acquired. But the circumstances developed rendered it a proper subject to be referred to a master, to ascertain what proportion of those lands had been so applied, and when; at what time the final settlement respecting them was made between the defendants *Comfort Sands* and *Henry Sands*, and whether the notes given to *Clayton*, and mentioned in the answer of *Henry Sands*, were satisfied, and how, and when. A report on these subjects was requisite to ascertain what proportion of the *Schaticoke* estate was to be considered as proper to be disposed of to the uses for which the complainants contend.

As to the lands in *Washington*, the bill stated that they were in *November*, 1800, conveyed by the defendant *Comfort Sands*, to his son, *Lewis Sands*, also a defendant, for 9,000 dollars.

The persons named in the answers as having received conveyances for parcels of the *Washington* property, were essential parties, but they have not been made parties; as to the surplus, which appears to exceed 390 acres, the complainants were entitled to an account of it.

Another branch of the complainants' claim extended to the demand of *Comfort Sands* against the *United States*. [Here his honor stated the facts relative to this claim.]

*No depositions were taken as to this point. It was therefore to be determined on the bill and answers.

As far as related to this debt, I was of opinion that the bill could only be sustained on the ground that the defendant *Isaac Kibbe* had not urged the prosecution of the claim on the *United States* with due diligence; for if the defendant *Nathaniel Prime* had done every thing incumbent on him to obtain a liquidation of the demand; or if the defendant *Isaac Kibbe* had not grossly neglected his duty as assignee, the latter must of course, as the legal organ, constituted under the laws of the *United States* to manage the interests of the creditors, retain the power of managing it in his discretion, for the benefit of those creditors generally; for the right of the complainants to prosecute must originate in some palpable neglect or positive refusal of the assignee to perform a duty apparently in advancement of the trust, as to the precise subject in which the creditors collectively seek to establish their rights; which they must always do at the peril of costs.

It was not pretended that the Court of Chancery could change the assignee. All that could be expected was, to enable the parties in interest to enforce the rights which the assignee was disinclined, either from negligent or sinister motives, to give effect to.

The demand, in this instance, was not admitted by the government of the *United States* to be a claim on its justice. It is not a debt. Several other persons were originally interested in it, and the persons who claim under the assignment have added to the number interested in procuring the allowance of the claim. None of these persons, for aught that appeared, were dissatisfied. The fund had not been realized. Blended as the original interests of *Comfort Sands* were with those of others, it was difficult so to separate them as to attribute fault to the assignee; and I could not discover that species *of neglect which would constitute a proper ground for my interference. Besides, the time elapsed between the period when *Comfort Sands* was declared a bankrupt, and the month of *August*, in the same year, the time the application was made to the assignee to prosecute the claim, afforded no opportunity to apply to Congress on the occasion, as it was well known that Congress was not in session between those days.

I was satisfied, from these views of the subject, that the bill, as to this point, could not be sustained.

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The *French debt*, assigned to *Joseph Sands*, was in a somewhat similar situation; but the persons for whose benefit the assignment was intended were not parties, and therefore no effective decree could be pronounced.

Next, as to the *notes* delivered to *John Havens*. [Here his honor stated the allegations and facts relative to them.]

The circumstances stated as to him, as to the *gist* of the bill, are, that he offered to prove his debt before the commissioners; that *Comfort Sands*, *Nathaniel Prime*, or some other of the friends of the former, pending the examination before the commissioners, found means satisfactorily to secure him, and procure him to assign the debt in question to *Nathaniel Prime*, and that he afterwards offered to prove the debt.

I know of no legal restraint on the assignment of the debts of a bankrupt, not interfering with the general and equal distribution of his effects among his creditors. Like all other *choses in action*, they are transferable, so as to entitle the assignee to the dividends of the original creditors. The circumstances stated afforded probable cause for suspecting improper practice on the subject; and as far as the bill operated as a bill of discovery, it was calculated to draw the necessary discoveries from the defendant. But though all the facts are admitted, they formed no ground for a decree against the defendant **Havens*; for the charge against him as deduced from the facts is, that he assigned his debt, and of consequence the dividends to accrue therefrom, to *Nathaniel Prime*.

The answer of *Lewis Sands* was silent as to the whole of this transaction; the making the notes for the consideration money for the *Washington* lots to *Comfort Sands* excepted.

There was no evidence to this point, and the whole rested upon the bill and answers, which did not make out a case for relief.

The complainants alleged, that the whole amount of the consideration money for the *Washington* property sold to *Lewis Sands*, was 9,000 dollars; that *Lewis Sands* gave notes to the amount of 19,000 dollars. The inference attempted to be drawn was, that he has received more than he has disclosed. There was, however, no circumstance to be collected from the pleadings which would warrant that inference. The collusion charged was denied. The consideration for the notes was not deduced from the property of *Comfort Sands*. For aught that appears, they may have been made by *Lewis Sands* for another, or without any consideration; but unless they were made in fraud of the creditors, there was no room to question them.

Whether these notes of *Lewis Sands* existed or not, was totally immaterial to the creditors of *Comfort Sands*. As they are stated to have been made after the bankruptcy of *Comfort Sands*, his endorsements are of course void; and the only ground upon which it was contended they ought to be can-

ced was their supposed connection with the property of *Comfort Sands*. This, however, has not been made out beyond the *Washington* estate; and on that they cannot operate as a *lien*. Besides, the *strict duty* of the assignee, as to these debts, was rather that of resistance than prosecution; and no *part of the interest confided to him could be withdrawn from the discretionary control with which he is legally invested, unless either *laches* or fault was made out against him; or unless the *laches* should be of a nature to enable the court to impute to him neglect generally, as to the whole concern. But he has not been required to do any act to repel the claim.

The notes in the hands of the defendant *Blagge* are in the same situation. They are the notes of *Lewis Sands*; and the complainants could not allege that the giving those notes was prejudicial to their interests, unless it appears that they detracted from the common fund. This, however, is not the case; for it does not appear when they were made payable. If payable heretofore, it did not appear that any measures had been taken to fix *Comfort Sands* as the *endorser*. If payable after the bankruptcy, as the notes never were delivered to the persons who were intended to be thereby benefited, and *Blagge's* interference cannot be resolved into an agency for them, they must, after the bankruptcy intervened, be legally inoperative; for the consummation of the contract being suspended, and an event occurring destructive of the endorser's power to bind himself, so as to affect the interest of his creditors, the capacity of clothing it with the legal essentials of consummation, were as effectually, to all legal purposes, lost, as in case of death. In either alternative, it would be useless to decree their delivery.

As to the houses and lots in *James street*, conveyed to the defendant *Robert Sands*, and by him to *John Jackson*; both *Comfort* and *Robert Sands* concurred in stating them to have been fairly conveyed, before the bankruptcy of *Comfort Sands*, in consideration of 3,200 dollars, to *John Jackson*, who was not a party, but was examined as a witness, and whose testimony corroborated those answers. But a decisive point is, it was *essential to make him a party to the suit, to bind his interest, and he has not been made a party.

If the complainants succeeded in establishing their right to a portion of the common fund, which the assignee had either despaired of, or neglected, it seemed reasonable that it should be converted into money under their management, as parties materially interested in making it as productive to the creditors generally, as possible; and as to that point, the assignee ought to have it in his power to execute the trust reposed in him by the bankrupt law, by giving to the fund thus recovered the destination prescribed by that law.

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I thought, however, that for this purpose, it was not necessary to appoint a *receiver*; a master being competent to discharge the duty required, in order to give the decree effect.

There were many other questions necessary to be determined in the cause, before a final decree could be made. On all the other matters pursued by the bill, I was of opinion it ought to be dismissed; but whether with or without costs, and how far the dismissal ought to extend, or how modified, it was not then necessary to determine. These were, therefore, reserved for further directions.

Pendleton and *T. A. Emmet*, for the appellants. The several conveyances from *Comfort Sands*, which are stated in the case, being for a valuable consideration, are good and valid, as between the parties. If they are void in regard to third persons, it must be either under the bankrupt law of the *United States*, (*Laws of U. S.* vol. 5. p. 45.) or the statute of this state for the prevention of frauds. (*Laws of N. Y.* vol. 1. p. 75. s. 2. 10 *Sess.* c. 44.)

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This is a controversy between creditors and purchasers; not between some creditors and other creditors, who have obtained an undue preference on the eve of, and in contemplation of, bankruptcy. The 10th section *of the bankrupt law provides, "that in case of a *bona fide* purchase made from or under the bankrupt, for a valuable consideration, before the issuing of the commission, by any person having no knowledge, information or notice of any act of bankruptcy committed, such purchase shall not be invalidated or impeached." This just and equitable provision is not to be found in the *English* statutes of bankruptcy. Again, by one of the *English* statutes, (1 *Jac.* c. 15. s. 5.) all voluntary conveyances by the bankrupt are void as against the assignees; but the law of the *United States* (Sect. 17.) declares them void only if made "with intent to defraud creditors." If the conveyances of *Comfort Sands* to his children were for a good consideration, and without any intent to defraud his creditors, they must be valid. (1 *Atk.* 93.) Any person, without notice of an act of bankruptcy, and before issuing the commission, may become a purchaser; for it would be not only unjust, but extremely inconvenient, in a commercial country, if conveyances made *bona fide*, and without notice, could be overreached and avoided, by any secret act of bankruptcy.

Any man may convey his own goods to another for money, at any time before execution, though he may fear executions for debts, provided there be no secret trust between him and the vendee. (*Bac. Use of the Law*, 63. *Law Tracts*, 156. 13 *Viner*, 517. *Cowp.* 427. 1 *Atk.* 93. 10 *Ves. jun.* 139.)

A debtor may *bona fide* prefer one creditor to another. (5 *Term Rep.* 285. *Prec. in Chanc.* 105. 13 *Vin.* 522. 2 *Anst.* 381. 1 *Ves. jun.* 280.)

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The house and lot in *Pine street* were sold for a valuable consideration, and before any act of bankruptcy. The execution was on a *bona fide* and valid judgment. The conveyance of the 27th April, 1801, to *Lewis Sands*, was for notes, which were, afterwards, paid away to creditors of *Comfort Sands*. The price was adequate. It was a sale at public auction, where there was a competition of bidders. Mere inadequacy of price is not, of itself, evidence of fraud; but is a circumstance of suspicion to be confirmed by other proofs. (2 *Ves.* 518. *Rob. on Fraud. Conv.* 373. 170.) The acts of ownership, when explained by the answers, are too trifling to furnish evidence of any secret trust for *Comfort Sands*.

It is admitted, that if the conveyances were after an act of bankruptcy, or notice of it, they were void. An act of bankruptcy cannot exist by implication. The debtor must do some one of the acts enumerated in the statute; as lying in prison two months without giving bail; and the act of bankruptcy is not complete, until that time is expired. In *England* it is different, and has relation back to the day of arrest. The commissioners state that *Comfort Sands* began trading on the 21st March. But their declaration is not conclusive; the act does not intend that any such judicial power should be exercised by them. The production of the commission and assignment is evidence merely, that the party was a bankrupt when the commission issued. If the time was doubtful, there ought to have been an issue to ascertain the fact. But if the act was committed on the 21st March, yet if *Lewis Sands* had no notice of it, the conveyance to him would be valid.

The *Brooklyn* estate was conveyed to *Henry Sands*, prior to any act of bankruptcy; and the only question is, whether the conveyance was made with a view to defraud creditors. Where a bill calls upon a defendant to answer as to certain facts, it makes the answer evidence as to such facts. If the answer is to be taken as fact, then there was no fraud. The acts of *Comfort Sands*, said to be evidence of ownership, were done by him as agent for his son. He could act from a mere *parol* authority. (*Rob. on Fraud. Conv.* 113. 9 *Ves. jun.* 251.) The answers expressly deny any fraud, and they are confirmed by the proofs in the cause.

But supposing that the conveyances were not valid; yet the decree is erroneous in not directing the money paid by the grantees to be refunded; and the conveyances to stand as security, until the money was repaid. A court of equity does not undertake to inflict a punishment; it merely affords compensation, or prevents fraud from producing any injury. Where a deed is valid between the parties, and fraudulent only as against creditors, the money paid by the purchaser is to be refunded. (4 *Bro. C. C.* 112. 1 *Ves. jun.* 206. *Prec. in Chan.* 80. 142. 1 *Ves.* 35. *Rob. on Fraud. Conv.* 451. 658. 1 *Bro. C. C.* 420. 8 *Ves. jun.* 283. 3 *Bro. C. C.* 156. 1 *Ves.*

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518. 2 *Ves.* 217. 2 *Atk.* 296. 3 *Bl. Com.* 437. 2 *Bos. & Pull.* 59.) The conveyances are set aside, on payment of the purchase money and interest. The right of the creditors to set aside the conveyance, is in the nature of an equity of redemption, and the property is considered as a mortgage for the money paid.

Again, the decree directs *Comfort Sands* to account for the rents and profits of the *Brooklyn* estate from 1798 to the time of the bankruptcy. This is clearly erroneous and unjust. He can never be called to account for acts done prior to his bankruptcy. If he could be made accountable for one year, he might be for his whole previous life.

Again, *Henry Sands* is required to account for the rents and profits from the 4th *April*, 1800. It is true the bankrupt law was passed on that day; but that is no reason for making him accountable prior to any act of bankruptcy. He is also made accountable for the value of the lots sold, taken at the time of the decree, though sold several years before, when they were of much less value; and no allowance is made for taxes, or sums paid to *Comfort Sands*, prior to his bankruptcy. (9 *Mod.* 412. 3 *Atk.* 401. 2 *Atk.* 107. 1 *Ves. jun.* 161.)

As to the *Greenwich* lots, conveyed to his daughters, it appears that *Comfort Sands* was, in 1796 and 1797, a man of large property. Where a man is not so much in debt as to render it probable, that his voluntary settlements and provisions are made with a view to defraud his creditors, they will be valid. (*Rob. on Fraud. Conv.* 17, 18, 19. 3 *Atk.* 410.) The debtor should appear to be absolutely insolvent at the time, to render such settlements for children, which are regarded with favor, void. (*Rob. on Fraud. Conv.* 452. 2 *Ves.* 10. 2 *Atk.* 520. *Cro. Car.* 550. 2 *Bro. C. C.* 90. *Cowp.* 434. 2 *Vern.* 44. *Ca. temp. King, C.* 78. 5 *Ves. jun.* 387. *Newland on Cont.* 384.)

Again, the chancellor has thought proper to take the property out of the hands of the assignees of the bankrupt, and place it in the hands of a master. If the creditors were dissatisfied, they might appoint new assignees. To put the property into the hands of a master, creates useless expense, is a violation of the bankrupt law, and an infringement of the rights of a majority of the creditors.

Riggs and *Hoffman*, contra. The respondents appear as creditors suing for themselves, and for those creditors who will contribute to the expense. The other creditors are not to be considered as those who have, by their vigilance, obtained a satisfaction for their debts; but as combined with *Comfort Sands*, in his attempt to defraud the respondents. This is not the case of a grantor applying to have conveyances set aside, in which the maxim is to be applied, that the party claiming equity must first do equity. The only grounds on which the

bankruptcy of *Comfort Sands* can have any influence on the questions raised in the cause are, IN ERROR.

1. That his assignee became a necessary party :

2. That if the conveyance of any of the property conveyed, independent of the bankrupt law, should be valid, the respondents, as standing in the place of the assignee, may have the benefit of the bankrupt laws :

3. As to bringing the money into court, and the distribution of the fund.

The cases which have been cited, if examined, will be found not to contain the doctrine to support which they were adduced, or are wholly inapplicable. An attentive examination of them will show, that *Lewis Sands* and *Henry Sands* can be entitled to no indemnity for their advances or responsibilities.

*We contend that the conveyances by *Comfort Sands* are fraudulent and void, at common law, independent of any statute of bankruptcy. We shall first exhibit the conduct of *Comfort Sands* from the beginning of these transactions, which are throughout marked with that want of candor and honesty, as to leave no doubt of the fraud. [Here the counsel went into a minute examination of the facts.]

Conveyances of property with a fraudulent intent, either pass no estate, or are void against the persons intended to be defrauded. (*Rob. on Fraud. Conv.* 591—596.) This is either by common law, or the statute of 13 *Eliz.* c. 5. (3 *Co.* 78. b. *Dyer*, 294. b. *Hob.* 72.) A *gratuitous* conveyance is always void, as against creditors. (*Rob. on Fraud. Conv.* 450, 451, 452.) The relationship between the grantor and grantee is a strong circumstance of suspicion ; and the possession of the grantor, and acts of ownership by him inconsistent with the pretended sale, are evidence of fraud. (*Rob. ib.* 198, 199. 554. 558. 2 *Bulst.* 225. 1 *Fonb.* 270. and *notes.*)

Again, in cases of alleged fraud, the answer of the party is not to be relied on as to any advances ; but positive proof of the payment of the money is required. The mere responsibility is not sufficient. (3 *P. Wms.* 288. 2 *Ves.* 516.)

Whoever comes into possession of an estate conveyed by fraud, must account for the rents and profits, when the conveyance is set aside. (2 *Rep. in Ch.* 30. *Langton v. Tracy*, *Ridgway's Rep. temp. Hardw.* 176. 9 *Mod.* 83.) The case of *Stackpole v. Davoren* (1 *Bro. P. C.* 9. 1 *Atk.* 13. 2 *Atk.* 107.) is a very strong authority on this point.

As to the disposition of the fund, the Court of Chancery, having jurisdiction of the cause, ought also to have the disposition of the property. It will not jeopardize it, by putting it in the hands of the assignee. It is more consistent with the dignity of the court, that it should be placed in the hands of a master, before whom all the creditors should exhibit their claims, that they may be contested or verified. In equity, all the creditors are equal, and no preference is to be given to

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judgment creditors, or such as have legal liens. The *proper mode is to declare that the creditors should prove their debts before the master, and that they should be paid *pro rata*. A receiver may be appointed to receive the rents and profits, until the final end of the suit. (*Wyatt*, 355, 356. 3 *Atk.* 564.)

YATES, J. In stating this case, for the purpose of giving an opinion, I shall confine myself to such facts as are immediately connected with the subjects, mentioned in the petition of appeal as exceptionable in the decree of his honor the chancellor, beyond which it is understood this court, according to an established rule, will not proceed in their adjudication, unless it be to extend and modify the decree, in favor of the respondents, according to such equitable rules as, in furtherance of justice, may be adjudged necessary; and I shall have a due regard to such acts of the parties generally, as tend to explain or establish important facts, connected with the subjects which are immediately before the court for adjudication.

[Here his honor stated the facts.]

The first question will be as to the validity of the conveyances.

1. With regard to the deed for the houses and lots in *Pine* and *Cedar streets*.

It is contended that a valid consideration was paid for this property, and that the proceeds have been properly disposed of; that the sale, being public and by virtue of several executions of contending creditors, is sufficient to test the adequacy of the price.

No doubt can be entertained, that from the commencement of this transaction, *Comfort Sands* has been actuated by motives to continue this property under his control, particularly while Mr. *Swartwout* was connected with it. What he intended should be the ultimate disposition of it, remains to be inquired into. Whenever a person, in the embarrassed situation in which *Comfort Sands* *appears to have been at this time, voluntarily executes a bond and warrant to enter judgment in favor of particular creditors, it must, from the nature of the transaction, create suspicion; and his conduct immediately becomes a proper subject for the most scrupulous investigation.

It is true, as has been remarked, that there are creditors who, in honor, and perhaps in conscience, ought to be preferred; and I shall not undertake to say, that *H. and S. Johnson*, together with *John Swartwout*, were not of this description. Had, therefore, this property been sold for its real value, to a *bona fide* purchaser, and the avails appropriated to discharge the debts and responsibilities assumed by those persons for *Comfort Sands*, it might perhaps be justified; but as they were satisfied by him in a different manner, this property virtually continued in his hands, and under his control; for it is admitted that *Swartwout* must be deemed the trustee of *Comfort*

Sands, having at his instance and request purchased from the sheriff. Notwithstanding his situation as trustee, *Swartwout*, on being requested by *Comfort Sands* to convey to his son *Lewis*, hesitates to do it. The reluctance evinced by him shows his impression of the impropriety of the proposed conveyance. He hesitated, certainly not from a desire to retain the property, and convert it to his own use. It must have been from the suspicious aspect of the conduct of *C. Sands*, with which he, in this particular, was fully acquainted from the commencement. On being informed, however, that he would take a note for 11,000 dollars from *Lewis Sands*, and pass the same to his creditors, *Swartwout*, on the 27th April, 1801, conveyed this property to *Lewis Sands*, subject to a lien of 2,500 dollars, amounting in the whole, to 13,500 dollars. This is the period it passed out of the hands of *Comfort Sands*, if the conveyance executed by *John *Swartwout* is to be considered valid: and as this, in fact, is a sale made by the father to the son at a time when his circumstances were much embarrassed, it must undergo a strict examination: for, independent of other circumstances, as observed by *Roberts, on Fraudulent Conveyances*, (p. 452.) "the very proximity of blood raises rather the idea of confederacy than affection."

It cannot reasonably be supposed, that *Lewis Sands* was not in possession of sufficient information respecting the circumstances of his father, to be convinced that he was at this time about becoming a bankrupt, and had already committed the act of bankruptcy upon which the commission was to be issued; and that a purchase made by him must be intended either for his immediate benefit, or for the ultimate advantage of his father. This is by no means an unwarrantable presumption, particularly when aided by the extraordinary situation of this property; that *John Swartwout* was the grantor, and his father the actual vendor, and exclusive manager of the business, both before and at the time of the sale, and who took his note in the first instance payable to bearer.

As to the amount of the consideration alleged to be paid for this property, I am not surprised that the true value could not be obtained at the sheriff's sale. On such occasions there will always exist a reluctance on the part of the purchaser of an estate owned by a person so extensively involved as *Comfort Sands* must have been at the time of the sale. This inadequacy of price appears evident by the testimony of *Swartwout*, the purchaser in the first instance. He states the value at 16,000 dollars, making a difference of upwards of 2,000 dollars between the amount alleged to be paid by *Lewis Sands*, and his valuation. When the peculiar situation of the witness is considered, we cannot but place reliance on his judgment. He asserts that his interference *was for his own indemnity, and consequently the value of this property must have been a subject of interest and inquiry to him. Besides, the other wit-

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nesses do not testify to the aggregate amount, but to the annual value. This is not a just rule. Many estates in this country sell for an amount, the lawful interest of which far exceeds the annual income. As this might, perhaps, be considered a mere matter of opinion, and that too much reliance ought not to be placed on it, I shall regard it only of importance when connected with the possession and acts of ownership. These are proved by his residing for some time in one of the houses, and by the testimony of *Isaac Pierson* and *John Gibson*, to whom, as owner, he let the house in *Cedar street*, gave receipts in his own name for the rent, and ordered repairs to be made. Add to this, the extraordinary application of the pretended consideration-notes to creditors, without their apparent consent or acquiescence.

From all these acts, the conduct of the parties appears to be so strongly marked with collusion, to the injury of the creditors of *Comfort Sands*, that I have no hesitation in saying, that the deed from *John Swartwout* to *Lewis Sands*, for the houses and lots in *Pine* and *Cedar streets*, is void.

The principles upon which this deed is adjudged void, cannot admit of a reimbursement, or an indemnification to *Lewis Sands*, against the consequences of his own fraudulent acts. There can be no doubt of his knowledge of the whole business, and an understanding that he was to participate in the expected advantages to be secured by this iniquity. Not a cent has ever been paid by himself; and the notes in the hands of *John Blagge*, we have reason to believe, remain under the control of his father. No equitable claim can consequently exist for reimbursement or indemnity, especially in favor of a person deemed a party to the transaction. *I am, therefore, of opinion, that the decree in this respect is correct, being grounded on the fraudulent intentions of both *Comfort* and *Lewis Sands*; and governed by principles different from those on which most of the cases adduced by the appellants, were decided, where deeds were avoided, or set aside on particular terms or conditions, founded on hard or unconscientious bargains.

It appears that the debt due to the bank of *New-York* of 56,000 dollars, without the addition of interest to accrue, was the true consideration to be paid for the *Brooklyn* property, and to which amount I shall confine my observations on the question respecting the adequacy of price.

The estate was held in common with *Joshua Sands*, the brother of *Comfort Sands*, who must be well acquainted with its value, and who considered it as worth, at the time of the sale, 75,000 dollars. A collector of taxes at *Brooklyn* states the value to be from 60,000 to 100,000 dollars. The average value, according to his estimation, would be 80,000 dollars.

I believe there is not one witness who puts it at less than 70,000 dollars; so that, on the most moderate valuation, there

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existed a difference of 14,000 dollars, and by the testimony of *Joshua Sands*, 19,000 dollars. This is a strong circumstance to presume the sale fraudulent.

The acts of ownership exercised over this property appear from the testimony of several witnesses. The allegation that those were the acts of an agent for *Henry Sands*, does not prevent the effect produced by the evidence on the validity of the whole transaction. No acts of ownership can be more striking than the receiving of rent, the payment of taxes, and, in some measure, managing and directing the sales and disposition of the property. Although it will not be questioned that an agent may be appointed by *parol*; yet it is somewhat extraordinary there did not exist some written authority, *particularly between parties who, at the time of the sale of this very property, evinced the greatest care and caution, by entering into written articles, when the deeds were to be executed a few days thereafter. No particular accounts as to this agency have ever been exhibited between them; and on other occasions, different and extensive payments are alleged to have been made on an adjustment of accounts; but no books were produced. These are evidently mere pretences to cover improper designs. I cannot doubt, therefore, but that the sale of this property was fraudulent, and the deed consequently void.

It does not appear that any money has been paid, except out of the sales of this property, nor that *Henry Sands* can have a claim for reimbursement and indemnity, for the reasons already assigned, in considering the same subject, respecting the *Pine and Cedar street* property. No doubt of a combination between *Comfort Sands* and *Henry Sands* can possibly exist. There evidently appears to be a deliberate system adopted by *Comfort Sands*, to put a large, if not the greatest, portion of his property into the hands of his children, for the avowed purpose of effecting an odious discrimination between his creditors, not disconnected with improper views and intentions to benefit himself, and wholly to defeat some of the creditors.

I shall next proceed to inquire into the account ordered of the rents and profits of this estate.

The decree in the Court of Chancery does not interfere with the purchasers from *Henry Sands*. Those persons are, perhaps, properly left in the undisturbed enjoyment of the rights obtained under that conveyance: but an account of the rents and profits of all the real estate conveyed by *Comfort Sands* to *Henry Sands* from the 9th day of *July*, 1798, is directed.

*The peculiar province of a court of equity is to detect and pursue fraudulent alienations, and arrest the property, particularly while in the hands of any of the parties to the transaction. This interference, however, must be grounded on an existing right in the party claiming redress, and can only take effect from the period when that right accrued in relation to the prop-

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erty. The title to such parts as are found in their hands must be considered as continuing in *Comfort Sands*, until the act of bankruptcy committed by him. I cannot, therefore, discover in what manner either *Comfort Sands* or *Henry Sands* can possibly be liable for the rents and profits of this estate, before that period.

It cannot be contended, that *Comfort Sands* had no right, before that time, to expend the avails or annual income, at his discretion, without responsibility to any one.

On a review, therefore, of the whole transaction between him and *Henry Sands*, and a recurrence to the reasons stated for the avoidance of the deed from him, the property being considered under his control and management, the demand on *Henry Sands* for the rents and profits previous to the acts of bankruptcy, ought not to be made. The decree ought, therefore, to be so modified, that no accounts of the rents and profits be required from either of them, until that event.

It is, undoubtedly, the duty of this court, in making up their opinion, to notice every incident connected with the cause, and consequently, that part of the decree ordering those parties who are out of the jurisdiction of the court, to join in a conveyance with the master, ought to be so modified as to enable the court to enforce the decree, and secure an effectual remedy to the parties.

Upon the whole, my opinion is, that the decree of his honor the chancellor be affirmed, except as to the time when the accounts of the rents and profits in relation to the *Brooklyn* estate ought to commence.

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*VAN NESS, J., not having heard the argument of the cause, gave no opinion.

SPENCER, J., was for affirming the decree below, except as to the person who was to receive and distribute the fund. He observed, that whenever an assignee declines to act, the creditors have a right to institute a suit for the benefit of all the creditors. By the law of the *United States*, the property of the bankrupt is vested in his assignees. The conveyances being adjudged fraudulent and void, the property remained in *Comfort Sands*, and by the bankrupt law became vested in his assignees. The conveyances were void at common law; but the Court of Chancery had a concurrent jurisdiction, it being a case of fraud; and the application to that court was merely for the purpose of avoiding the conveyances. It does not follow, that because the Court of Chancery had this cognizance of the cause, it is to take the property out of the hands of the assignee, and place it in the hands of a master. Having disencumbered the estate of the conveyances, the property remained as if those deeds had never existed; and being vested, by the law of the *United States*, in the assigness, no court can divest it.

KENT, Ch. J. The first and principal question in this cause arises upon two deeds of conveyance of the estate of *Comfort Sands*; the one from him to his son *Henry*, for the *Brooklyn* estate, and the other from *John Swartwout* to *Lewis Sands*, for the houses and lots in *Pine* and *Cedar streets*, in the city of *New-York*.

Comfort Sands stopped payment and became insolvent, in the year 1797. He had been very extensively engaged in trade, and at the time of his failure, he was possessed of a large real and personal estate, and owed debts to a great amount.

Instead of calling his creditors together, and exhibiting to them a full and fair account of his debts and estate, according to the usual course with unfortunate merchants, he refused or neglected to exhibit any statement of his affairs, or to give them any satisfaction on the subject. He declared that he would prefer those creditors who did not sue him; and just before the commission of bankruptcy had issued, he went so far as to declare in writing, that his hostile creditors would suffer for their conduct, and not get five per cent. for their demands.

With such a temper of mind under his misfortunes, it was very natural that the general disposition of his estate to his children should destroy the confidence, and awaken the apprehensions of his creditors.

In *June*, 1798, he conveyed his *Schaticoke* estate; in *July*, 1798, his *Brooklyn* estate; and in *September*, 1799, his *Minisink* estate, to his son *Henry*. In *November*, 1798, his household furniture was seized under an execution issued in favor of two friendly creditors, and sold to *Nathaniel Prime*, his son-in-law, who left the same to continue in his possession and enjoyment. In *April*, 1801, his houses in *Pine* and *Cedar streets* were, by arrangement with *Swartwout*, his trustee, conveyed to his son *Lewis*, and in *June* following he conveyed to the same son his lots in the city of *Washington*.

These sons, at the time of their respective purchases, were not men of reputed property, or by any means competent to pay for such great estates. His son *Henry*, in 1798, had just quitted his clerkship in an attorney's office, and was not in much business, and possessed little pecuniary credit. His son *Lewis* was also a member of his family in 1801, and of no reputed responsibility. These were the two sons to whom Mr. *Sands* thought proper to convey real estate worth, according to his own valuation, nearly 100,000 dollars: and he declared, before the commissioners of bankrupt, that these sales were made to prevent the operation of judgments, and to save his property from being sacrificed.

The general aspect of the business must at once excite in the mind a well-grounded distrust of the probity of the transactions; and when we connect with it this confession of the party, the

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conclusion must press very strongly upon us, that these sales were not fair and honest, but were fraudulently intended to secure a very considerable share of the property, for the future benefit of himself and his children. A sale made, with the intent avowed by *C. Sands*, comes almost within the very words of the statute of 13 *Eliz.* which we have adopted, (*Laws of N. Y.* vol. 1. p. 75.) which declares, that every conveyance of lands made with the purpose or intent, to *delay, hinder*, or defraud creditors of their lawful actions and demands, shall be utterly void. (2 *Rev. Stat.* 137.)

I shall first look more particularly into the circumstances attending the sale of the *Brooklyn* estate.

Comfort Sands, on the 5th day of *July*, 1798, entered into a formal written agreement with his son *Henry*, to convey to him the *Brooklyn* estate for 60,000 dollars; and this agreement was carried into effect, in four days thereafter, by the deed of the 9th of *July*. Such a studied formality in the negotiation, such a preliminary precaution without any apparent use or necessity, and that, too, between a father and a boy, just then emerged from school, and, as we may very well infer from the facts, still much dependent upon his father, and when the sale was avowedly intended by the father as a benefit to the son, is, to say the least of it, very extraordinary. It was out of the usual and natural course, as between such parties, and it therefore betrays contrivance, in order to give color to the transaction. The estate was *estimated at 60,000 dollars, which was the nominal consideration in the deed. To make up this sum, the mortgage to the bank of *New-York*, amounting, in principal and interest, to 53,000 dollars, was taken into the estimate, and another year's interest to the bank, to the amount of 3,000 dollars, was anticipated. The residue of the purchase money, after deducting the mortgage upon the premises, with this anticipated interest, was 4,000 dollars, and that sum was to be paid to *Comfort Sands*; and he was authorized by *Henry* to receive it, and he afterwards did receive it, out of the rents and profits. The estate was thus sold for 3,000 dollars less than the reputed value in the deed; for the rents and profits for the year ensuing the sale, were a complete set-off against the interest which was to grow due in that year upon the mortgage. The consideration sum, as agreed upon by the parties at the time of the sale, is thus reduced to 57,000 dollars; and yet the parties contrived, without any justifiable or even plausible pretext, to give the consideration in the deed an artificial and nominal rise to 60,000 dollars.

But the reputed value in the deed was not the real value of the estate. It was the *minimum*, or least sum at which any person had ever computed its value. The value, in *July*, 1798, according to the weight of testimony, was at least 75,000 dollars. This was the positive testimony of *Joshua Sands*, who was perfectly acquainted with the property, and very compe-

tent to determine its value ; and this was even below the average price, according to the opinion of the collector of taxes at *Brooklyn*. We may then very fairly consider, that the price of the *Brooklyn* estate, as estimated in the sale from *C. Sands* to his son, was at least 18,000 dollars below the real value. Here was then a great inadequacy of price.

But as the 4,000 dollars, coming to *Comfort Sands* upon this sale, were paid out of the rents and profits, the *son never paid a cent out of his own pocket, nor is it probable that the father ever looked to him as personally responsible. The sale has every appearance of a settled design to save the *residuum* of the estate, after the discharge of the mortgage to the bank, from the grasp of the creditors, and to reserve it either for the use of the father, or, as he himself expresses it, for the benefit of his son.

These very striking circumstances attending the execution and consideration of the deed, were followed by acts of *Comfort Sands*, with the knowledge and privity of the son, which confirm the inference that the sale was intended as a mere cover to protect the estate, and defraud the creditors. He continued in the exercise of acts of ownership, by selling and leasing lots, and holding himself out to the world as the real owner. For the evidence of this fact, I need only refer generally to the testimony of the witnesses, and especially to the deed from *C. Sands* to *Annett*, in *March*, 1802, the agreement to sell lots to *Shelzel* in the same year, and the lease from *C. Sands* to *Britten* in *April*, 1804 ; and none of the lots specified in these sales were included in the reconveyance from the son. *C. Sands* also continued his former attentions, and bestowed all his care upon the property. His son *Henry* did little or nothing. He made few (if any) contracts, and he took upon himself neither trouble nor responsibility.

I am aware of the allegation that *C. Sands* acted all this while as the agent of his son ; but this allegation, although easily made, is not supported by proof. We have no evidence of any regular appointment or instructions from the son, or of any regular account kept and rendered by the father of his receipts and expenditures, as agent. The attempt to screen these constant, essential and conclusive acts of ownership, under the *authority of an agent, is a shallow artifice, destitute even of the merit of plausibility.

The next subject of examination is the deed from *Swartwout* to *Lewis Sands*.

The *Pine* and *Cedar streets* lots were sold at a sheriff's sale, in 1798, upon the judgment in favor of *H. and S. Johnson* ; and *John Swartwout* purchased them for about 11,000 dollars. He became the purchaser, at the request of *C. Sands* ; he says, that he was also induced to make the purchase for his own eventual indemnity, as a surety. *C. Sands* told *Swartwout*, at the time of making the request, that it would be the

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means of preventing a sacrifice of the property, and that the plaintiffs in the execution would enable him to pay the purchase money to the sheriff. This was accordingly done by C. Sands, who put into his hands certain notes of the plaintiffs, which the sheriff received as payment. The sale to *Swartwout* was, therefore, made in consequence of an amicable arrangement between all parties; and it was manifestly a mere cover of the property for the benefit of C. Sands. *Swartwout* continued the nominal, and C. Sands the real owner, until April, 1801, when *Swartwout*, being exonerated from his responsibilities, did, at the request of *Comfort Sands*, convey the houses and lots to his son *Lewis Sands*, and took a note from *Lewis*, payable to bearer for the consideration sum, and delivered the same over to the father. If, then, we view this act in its true and genuine light, here was a sale of these lots by *Comfort Sands* to his son *Lewis*; and the question is, whether that sale was not a palpable fraud attempted to be committed upon the creditors.

The contrivance by which this property had, for the three preceding years, been covered under the name of *Swartwout*, prepares the mind to anticipate fraud in the sale to the son.

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*It was stated, in the argument, that this deed was fraudulent and void under the late bankrupt law, and I incline strongly to this opinion. C. Sands had been in gaol upwards of 60 days, when the deed was executed; and from the testimony of *John Jackson*, he was engaged in actual trade in the month of March, preceding the date of the deed. The commencement of his trading does not appear. *Jackson* proves only acts done, as a trader, in March. But from his former general character and business as a merchant, and from those acts in March, may we not fairly presume, that in February preceding he was equally a trader? If so, C. Sands had clearly committed an act of bankruptcy, within the express words of the bankrupt law, at the time of the sale to *Lewis*; and can it be possible that *Lewis Sands* was a *bona fide* purchaser, without notice of that act of bankruptcy? He was then a member of his father's family; and could he have been ignorant that his father had been in *King's* county gaol, since January of that year; and could his father have carried on trade without his knowledge? The thing is to me incredible.

But admitting that the acts of bankruptcy mentioned by *John Jackson*, were the only solitary instances in which *Comfort Sands* assumed the character of a merchant while in gaol, another and a more serious question then arises, With what motive could C. Sands have engaged in the petty business of shipping 50 barrels of flour to *Europe*? Was it really for the sake of mercantile profit, and of renewing his connections and operations abroad? He was at that time completely insolvent, at war with his creditors, lost as to credit, and actually in prison. Was it not then rather for the purpose of becoming a

trader, merely to bring himself within the purview of the bankrupt law, to which he soon after resorted? My mind is overcome by the irresistible pressure of circumstances which carry it to this conclusion; and those circumstances *outweigh his assertion to the contrary. The question then is, Was not this sale to *Lewis Sands* made under a contemplation of bankruptcy, and with the privity of the son as to that intention? The deed, in either alternative which I have mentioned, was void, as made in *fraudem legis*, and to defeat the equality and equity of the bankrupt law.

The validity of the deed does not, however, rest on the ground of constructive fraud, by being made against the policy of the statute. The deed was fraudulent in fact, by being made under the influence of corrupt motives, to cheat creditors, and it was, therefore, void at common law, and as against the statute of *Elizabeth*, which we have reenacted, and which is only in affirmance of the principles of the common law.

The sale to *Lewis Sands* was for 11,000 dollars, and subject to a mortgage to *Jones & Haring* for 2,312 dollars. The property, near three years before, was, in the opinion of *Swartwout*, worth 16,000 dollars. The price was therefore inadequate, though not grossly so. What became of the large note for 11,000 dollars does not appear, except from the answers of *Comfort* and *Lewis Sands*; and as the facts in those answers were put in issue, they ought to have been supported by proof. But assuming the account of the disposition of the note for 11,000 dollars to be correct, it then appears that the note was soon after exchanged, by arrangement between *Lewis* and his father, for several small notes, and most of them were deposited with *John Blagge*, an agent of *C. Sands*, where they remained (for any thing that appears to the contrary) unknown to the creditors, and where they remain still. *Blagge* says, that he was not the agent of the creditors for whose use these notes were alleged to have been lodged, nor was he acquainted with but one of them. It is exceedingly probable that *C. Sands* never gave any information to the creditors concerned, of the deposit *of those notes, because no application was made by the creditors to *Blagge* for the possession of them. The notes of *Lewis Sands*, which were not deposited with *Blagge*, but endorsed by *Comfort Sands*, and delivered over to the creditors, *Gracie* and *Heyer*, were attended with these singular circumstances. They fell due after the discharge of *Comfort Sands* under the bankrupt law, and yet he interferes in the first instance voluntarily, between the creditors and *Lewis Sands*, and assumes to pay them himself. Can there be more convincing testimony that the notes were considered by *Comfort Sands* as his proper debt, and that his son's name upon the paper was regarded by him as a matter of form? The history of these notes is alone sufficient to satisfy me of the fraudulent collusion between *Comfort Sands* and his son *Lewis*,

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and that the notes were never considered by either of the parties, as being given for a valuable consideration. *Comfort Sands*, at the time of this pretended sale, was in *King's* county gaol, and upon his discharge in *July*, he returned and occupied, as his own, the estate in question. He resided in the house in *Pine street*, and he continued to let the house in *Cedar street*, first to *Pierson*, and afterwards to *Gibson*; and he held himself out to those tenants, as the real owner. He speaks of acting all the time as agent for *Lewis Sands*, and of having settled with him; and he rests contented with this naked allegation, without the exhibition of a single document or voucher which might have afforded color for his inference, or apology for his pretension. But we have a right to require some definite and specific evidence of his having acted and accounted as the authorized agent of his son. His acts and his declarations were in the character of owner, not of agent; and the law will not allow him to assume in succession the one character or the other, as best suits his convenience. Such an ever varying attitude is destructive of all simplicity *and sincerity in dealing. *Quo teneam vultus mutantem Protea nodo?*

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I forbear to dwell longer on this subject. The general character of the transactions before us, the conclusions which I have been obliged to draw, and the contrast between those conclusions and the answers of the parties to the deed, naturally give birth to painful reflections. I will, therefore, only observe, that for the reasons which have been suggested, I hold the two deeds to be grossly fraudulent, and absolutely void; and this brings me to consider the next question in this case, which was, whether the deeds ought not to stand as security to reimburse the sons for their advances, and to indemnify them against their outstanding paper.

The denial of this prayer appears to me to result necessarily from a decision against the validity of the deeds. On the ground of absolute fraud, the deeds were void to all intents and purposes. It is the same thing as if no such deeds had ever been executed. A fraudulent conveyance is no conveyance, as against the interest intended to be defrauded. This is the plain language and intelligent sense of the rule of the common law. (*Roberts on Fraudulent Conveyances*, 591. 596, 597. *Hob.* 72. *Humberton v. Hengil, Dyer*, 194. 294. 296. pl. 8. 3 Co. 78. b.) It is impossible that those deeds can be permitted to stand as a security, if they are to be adjudged void *ab initio*. If they have no lawful existence, it would be inconsistent and absurd to recognize them for any lawful purpose. I presume there is no instance to be met with of any reimbursement or indemnity afforded by a court of chancery to a *particeps criminis*, in a case of positive fraud. In *Smith v. Loader*, (*Prec. in Chan.* 80.) the party advancing money to an agent, under a combination with him to cheat the principal, lost his whole security from the principal for the money actually ad-
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vanced to his agent. It is fit and proper that *this result should take place, as a contrary course might afford countenance to fraud by giving it a partial effect. It would not become a court of equity to take a single step to save harmless a party detected in a fraudulent combination to cheat. No right can be deduced from an act founded in actual fraud. *Nemo ex proprio dolo consequitur actionem.* The cases in which a deed is set aside on terms, are not at all analogous to the one before us. They are usually those in which one of the parties comes in for help against a hard or unconscientious bargain, or when a contract is fraudulent by construction of law only, as being against the policy or provisions of some particular statute. When one of the parties to a bargain asks to be relieved, the rule very properly applies, that he who demands equity under his own contract, must give equity. (1 Ch. Ca. 97.) But the rule has no manner of application to the present case.

The refusal to aid the purchasers here by means of the deeds, will not only be proceeding upon plain and sound principles, but we can do it without any actual loss to the party; for what is there to refund to these sons? *Henry Sands* made no payments, except out of the proceeds of the *Brooklyn* estate; and as far as the sales of lots in that estate were made *bona fide*, and the moneys paid in discharge of the mortgage to the bank, the decree does not disturb them. It only directs a sale of the property not so disposed of. Nor is there evidence that *Lewis Sands* ever paid a cent upon the notes, which he gave to his father upon the purchase of the lots in *New-York*; and he runs but very little hazard upon the outstanding notes. Most of them remain still under the control of his father, in the hands of *Blagge*, and he has his defence, if his father should attempt to enforce them at law; and as to the two notes which were delivered into the hands of the creditors, the payment *of them was expressly assumed by *Comfort Sands*, and the creditors were taught to look only to him.

Having thus examined the principal questions in the cause, I shall proceed briefly to consider some minor points which have been submitted.

The decree touching an account of the rents and profits is complained of; and I am of opinion, that upon this point it ought to receive some modification.

Lewis Sands is to account only for the rents and profits which he received subsequent to his deed; and so far the decree is undoubtedly correct. But in respect to the *Brooklyn* estate, the decree ought to be so modified as to make *Henry Sands* account only for the rents and profits received since the act of bankruptcy of his father, and that *Comfort Sands* be required to account only for the rents and profits subsequent to that event. The right of the complainants to call him to account cannot be extended beyond the time of his bankruptcy,

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because their title as creditors to an account accrued then, and not before. Chancery never decrees an account of rents and profits, but from the time that the right of the complainant accrued. (*Ridgw. Rep.* 180. 182, 183. 187.) In other respects the decree as to this estate is correct.

The only remaining point appealed from is respecting the disposition of the fund arising under the decree. The city lots are directed to be sold by a master, and *Lewis Sands* is directed to join with him in the conveyances to be made; and out of the proceeds the master is first to satisfy the mortgage of *Jones* and *Haring*, and then bring the surplus money into court, to be distributed among the creditors, as should thereafter be directed. In like manner, the *Brooklyn* estate is ordered to be sold by a master; and *Comfort* and *Henry Sands*, and all other proper parties, are to join in the conveyances, and the moneys arising from the sales are to be also brought into court, to be distributed. The petition of appeal complains, that by *this decree the management of this estate is taken out of the hands of the assignee. The original assignee, *Kibbe*, was a party to this suit; and in his answer he admits, that upon the application of the complainants, he had refused to prosecute the suit. This being the case, there can be no doubt that the creditors had a right to seek justice for themselves; for it was ruled in the Court of Chancery, so long ago as the year 1740, in the case of *Franklyn* and *Fern*, (2 *Eq. Ca. Abr.* 103.) that if the assignees refuse to bring a bill for the benefit of the bankrupt's estate, any creditor has a right to bring such bill. *Kibbe*, the assignee, in his answer, insists, however, that if the deeds should be set aside, the proceeds of these estates should be paid to him, to be distributed according to law. The contest then here is, who is to distribute the effects of the estate so recovered by the decree; and in this respect the petition of appeal has proceeded without any real foundation for complaint. The chancellor has made no decree as to the distribution. He does by the decree expressly reserve that point to be determined when the money shall be brought into court; and there is no reason to presume that he does not mean to place the moneys in the hands of the assignee for distribution. Having gone so far without the aid of the assignee, and against his will, I think the Court of Chancery was bound to render the remedy to the creditor effectual, by commanding possession of the fund. This power follows incidentally from the acknowledged jurisdiction which the court has in the first instance to sustain the bill. If the decree was to contain nothing more than the judgment of the court, that the deeds were fraudulent and void, it would be a suit without relief; for execution is the fruit and end of the law. The assignee does not ask for the privilege of selling the estates, at his own time and pleasure. He only claims the proceeds for

the purpose of distribution. I *see no objection to the decree in directing a sale of the estates. It is the consummation of the remedy sought for. A sale by the master is a judicial sale, and binds all the parties to the suit who have right or claim. It would, accordingly, bind the assignee; and though it has been suggested that there has been a change of the assignee, and this fact was admitted in the proceedings which took place in this cause the last winter; (*2 Johns. Rep. 487.*) yet from those proceedings it appears that this change did not take place until subsequent to the decree; and the new assignee is equally bound by that decree with his predecessor, for he stands precisely in his place, and is subject to all his obligations.

I have now finished the consideration of all the points in the decree upon which the appeal was brought; and I think it is a rule of practice from which we ought not to depart, that when the petition of appeal recites specifically the parts of the decree of which it complains, and from which the appeal is made, the appellant is to be confined to those parts of the decree. I have not, therefore, examined the question made respecting the feigned issue; for that issue was no part of the decree appealed from; and it was very properly omitted, as the *chancellor* observed, in stating his reasons to this court, that both parties suggested the propriety of that issue.

The result of my opinion, accordingly, is, that, except as to the rents and profits of the *Brooklyn* estate, the decree, as appealed from, was in all other respects correct, and ought to be affirmed. But some modifications of the decree of affirmance, if any are to be made by this court, have been suggested by the respondents' counsel. As *Henry Sands* is out of the jurisdiction of the court, he ought not to be required to make any conveyance of the *Brooklyn* estate. This modification, I think, is necessary. The assignee may, also, perhaps, be required to join in the conveyances, before the proceeds *are paid over to him, though I do not believe that act requisite to perfect the title; and all costs and charges attending the suit in this court and in the court below, and for which the respondents might otherwise be responsible, ought to be previously deducted before they are paid over.

There were also some additions to the decree prayed for. One was respecting the balance, if any, of the demand of *Sands* against the *United States*, and assigned to *Prime*, and which would remain due after the claims under that assignment were satisfied; and also respecting the balance, if any, due from *H. and S. Johnson* to *Sands*. These balances ought undoubtedly to be ascertained, brought into court, and distributed in like manner as the other funds; and I see no reason why decrees to this effect ought not to be made, when the final decree comes to be completed in the Court of Chancery. The decree

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before us does not touch these questions; but the chancellor, in giving his opinion, seemed to intimate, that, as to these objects, the bill ought to be dismissed; and it becomes, therefore, proper, that an expression of the opinion of this court should be made, that these objects ought to be embraced in the final decree.

The rest of the court were also of opinion, that the decree below ought to be affirmed, except as to the part which directs the sale of the estates by the master; and it was thereupon ORDERED, ADJUDGED and DECREED, as follows, to wit:

That the conveyance made by the sheriff of the city and county of *New-York* to *John Swartwout*, mentioned in the pleadings in this cause, for the house and lots of ground, situate adjoining *Pine* and *Cedar streets*, in the city of *New-York*; and also the deed in the said pleadings mentioned, for the said houses and lots of *ground, from the said *John Swartwout*, to the appellant *Lewis Sands*, having been made with intent to delay and defraud the respondents and others, the creditors of the appellant *Comfort Sands*, are void, as against the said creditors: And it is further DECLARED and DECREED, that the said houses and lots of ground, adjoining *Pine* and *Cedar streets* aforesaid, belonged to the appellant *Comfort Sands*, at the time he became a bankrupt, as in the pleadings and proofs mentioned, and passed to, and became vested in the assignee of his estate and effects, as such bankrupt, subject to the mortgage thereon mentioned in the pleadings in this cause to the defendants *Samuel Jones* and *John Haring*, in the same manner as though the said conveyances had not been made: And is further ORDERED, DECREED and ADJUDGED, that the said appellants, *Comfort Sands* and *Lewis Sands*, respectively, account before one of the masters in chancery, for the rents and profits of the said houses and lots of ground, adjoining *Pine* and *Cedar streets*, from the twenty-second day of *June*, 1801, which they, the said *Comfort Sands* and *Lewis Sands*, have respectively received, or without wilful default might have received; and that in taking such accounts, allowances for taxes, repairs and improvements, permanently useful, be made to the said *Comfort Sands* and *Lewis Sands*; and the balance of the said accounts for the said rents and profits, when received, shall be placed in the hands of the assignee or assignees of the estate and effects of the said *Comfort Sands*, as such bankrupt: And this court doth further ORDER, ADJUDGE and DECREE, that the deed of conveyance, made by the said *Comfort Sands* to the appellant *Henry Sands*, (bearing date on or about the ninth day of *July*, in the year 1798,) mentioned in the pleadings, of the lands, tenements, hereditaments and real estate, situate at *Brooklyn*, in *King's* county, in the pleadings also mentioned; and also the *deed, which appears by the proofs in the cause,

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for part of the said lands, tenements and hereditaments, dated on or about the fifteenth day of *September*, in the year of our Lord, 1801, from the said *Henry Sands*, to the said *Comfort Sands*, having been made with intent to delay and defraud the respondents, and others, the creditors of the appellant *Comfort Sands*, are void as against the said creditors: And it is further DECLARED and DECREED, that the said lands, tenements, hereditaments and real estate, situate at *Brooklyn* aforesaid, and which, on a partition thereof, between the said *Henry Sands*, as grantee of the said *Comfort Sands*, and *Joshua Sands*, as mentioned in the pleadings and proofs in this cause, were assigned, or fell to the share of the said *Henry Sands*, belonged to the said *Comfort Sands*, at the time he became a bankrupt as aforesaid; and passed to, and became vested in, the assignee of his estate and effects, as such bankrupt, subject to the mortgage thereon, mentioned in the pleadings in this cause, to the president, directors and company of the bank of *New-York*.

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And it is further ORDERED, ADJUDGED and DECREED, that the appellants *Comfort Sands* and *Henry Sands*, respectively account, before one of the masters in chancery, for the rents and profits of the said last-mentioned lands, tenements, hereditaments and real estate, situate at *Brooklyn*, from the twenty-second day of *June*, in the year of our Lord, 1801, which they, the said *Comfort Sands* and *Henry Sands*, have respectively received, or without wilful default might have received; and that, in taking such accounts, allowances be made to the said *Comfort Sands* and *Henry Sands*, for taxes, repairs and improvements, permanently useful, and the balance of the accounts for the said last-mentioned rents and profits, when received, shall be placed in the hands of *the assignee or assignees of the estate and effects of the said *Comfort Sands*, as such bankrupt:

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And it is further ORDERED, ADJUDGED and DECREED, that out of the said estates, situate adjoining *Pine* and *Cedar streets*, in the city of *New-York*, and at *Brooklyn*, or out of the proceeds of the sales thereof, or any part thereof, which has or may be brought into the Court of Chancery, by virtue of any decree or order thereof, or out of the said rents and profits, the respondents in the first place be reimbursed and satisfied all costs, charges and expenses, in and about the prosecution of the said suit, in the Court of Chancery, and the proceedings in this court, the amount whereof is to be ascertained by the Court of Chancery, which court is to give proper directions herein:

And it is further ORDERED, ADJUDGED and DECREED, that the said decree of the Court of Chancery, so far as the same is not hereby modified and altered, be and the same is, hereby, affirmed: And that the said decree, so far as the same directs any

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conveyance to, or sale by, a master in chancery, of the said estates, or either of them, be, and the same is hereby reversed; and that the record and proceedings brought here with this decree, be remitted to the Court of Chancery, to be executed according to law.

Judgment of affirmance.

END OF THE CASES IN ERROR.

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N., a native of *Ireland*, emigrated to the *United States* in 1778 or 1779. In 1784, he purchased a lot of land in this state, and died in 1798, without issue, leaving a brother and three sisters, living in *Ireland*. In 1804, an act of the legislature was passed, vesting the real estate of which N. died seised, in L., one of his sisters, who had married an alien, in like manner as if she had been a citizen of this state, at the death of N. In an action of ejectment, it was held, that N., having emigrated to this country after the declaration of independence, was to be considered as an *alien*, and that the land held by him was, by the 9th article of the treaty of 1794, between *Great Britain* and the *United States*, vested in him and his heirs, notwithstanding they were *aliens*; and that the act of the legislature of 1804, giving the whole of his real estate to L., one of his four heirs, in exclusion of the rest, being contrary to the treaty, was inoperative. *Jackson, ex dem. Folliard and Wallace, v. Wright*, 75

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B.

BAIL.

1. Where a *capias ad respondendum* against bail was made returnable on the third day of the term, and on the 12th day of the term, the bail made affidavit, that until the 6th day of the term, he had supposed the writ returnable on the last day of the term, so that he should have eight days in the next term to surrender the principal, and that after discovering his mistake, it became impossible to make the surrender in time, as the bail was out of the state, and more than 150 miles from Albany; it was held, that the application for relief was too late, and that the excuse was not sufficient. *Rathbone v. Warren*, 310
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BANK.

1. A clerk in the bank, who acted as a book-keeper, and whose particular duty it was to keep the ledger into which the entries are copied from the teller's cash book, received money from A., who was a dealer with the bank, for the purpose of having the same deposited in the bank, and which he entered in the ledger, and afterwards into the dealer's bank book; but the money was not received by the teller, or entered in his cash book, and was supposed to be embezzled with other money by the clerk, who absconded; it was held, that the clerk, in making the deposit, was the agent of A., and not of the bank; and that A. must be answerable for the deficit in the deposit. *The Manhattan Company v. Lydig*, 377
2. Whether the bank used due diligence to detect the fraud in the clerk, is a question of law; if the bank takes the usual and customary mode to detect the frauds or mistakes of its clerks, it will be sufficient evidence of due diligence. *ib.*
3. If a dealer with the bank sends his bank book, with the money to be deposited, and the receiving clerk or teller enters the amount to his credit, in such bank book, at the time the deposit is made, it is conclusive on the bank; *aliter*, if the deposit is first made, and the

entry is afterwards copied from the ledger into the dealer's bank book.
ib.

BANKRUPT.

- 1 Where the grantor of a deed, made to defeat creditors, afterwards became a bankrupt, the deed being declared void, the grantee was held accountable for the rents and profits, subsequent to the act of bankruptcy, or from the time when the right of the creditors to call him to account accrued, and not before. *Sands and others v. Codwise and others*, 536
- 2 Where a court of chancery sets aside the deeds of a bankrupt, on the ground of fraud, the property is not to be placed in the hands of a *master*, but is to be disposed of by the *assignees* of the bankrupt, according to the bankrupt law of the *United States*. *ib.*

BILLS OF EXCHANGE, CHECKS, AND PROMISSORY NOTES.

- 1 The person to whom a bill of exchange is remitted, in payment of a precedent debt, cannot, in case of a protest, recover the 20 *per cent.* damages from the remitter. *Thompson v. Robertson & Browne*, 27
- 2 A bill was remitted by A. to B. in payment of a precedent debt, and was specially endorsed to B. The bill having been protested for non-payment, B. afterwards endorsed it to C., who paid him the amount. C. struck out all the intermediate endorsements on the bill, and brought his action as first endorsee against the first endorser, to recover the amount with damages. It was held, that after the protest, B. was the mere agent of A. in regard to the bill, and ought to have returned it to him; that C., having taken the bill, with full knowledge of the situation of B., must stand in his place, and be entitled to the same rights, and no more; and could not, therefore, recover the 20 *per cent.* damages; and that A. was the only person entitled to damages. *ib.*
- 3 Where a bill is first endorsed in blank, and afterwards specially endorsed, whether the subsequent holder can strike out the special endorsement, and bring his action as first endorsee? *Quere.* *ib.*
- 4 The holder of a bill of exchange, drawn in *New-York* on *Great Britain*, or any other part of *Europe*, and returned protested for non-payment, can recover no more than the contents of the bill, and 20 *per cent.* damages, with the interest, or at the par of exchange. He can recover nothing for the difference between the price of bills at the time the bill was returned, and the time it was drawn. *Hendricks v. Franklin*, 119
- 5 When a person in *New-York* purchases goods in *England*, and is sued here, the creditor can recover the amount at the *par of exchange* only; he is not entitled to any allowance for the rate of exchange, or the price of bills on *England*. *Martin and others v. Franklin and others*, 124
- 6 Where a foreign bill of exchange is protested for *non-acceptance*, the holder, on giving due notice thereof, may commence an action against the drawer and endorser, on such protest for non-acceptance, without waiting for a protest for non-payment, and may recover, besides the amount of the bill, 20 *per cent.* damages, with the usual interest and charges of protest. *Weldon and Furniss v. Buck*, 144
- 7 Where a bill of exchange is drawn in *England* and payable there, the holder here can recover only 5 *per cent.* interest. *Foden and Slater v. Sharp*, 183
- 8 The *acceptor* of a bill of exchange, in an action against him, cannot object to a protest for non-payment, that it does not state that the de-

mand was made on him personally; it is sufficient if it be stated that payment was demanded at the house or place where the bill was accepted to be paid. *ib.*

9. Where a note, payable on demand, was negotiated *five* months after its date, and there were several payments prior to its transfer, in an action by the endorsee, the maker was not allowed to set up any defence, as against the payee, or to impeach the amount due on the face of the note, at the time of its transfer. *Sanford v. Mickles and Forman*, 224
10. Where a promissory note was made at *Jamaica*, payable in *New-York*, it was held, that the contract was to be governed by the laws of *New-York*. *Thompson v. Ketcham*, 285
11. Where no place is mentioned in a note, at which the money is to be paid, it *seems*, that parol evidence is admissible to show at what place it was agreed that the note should be paid. *ib.*
12. Where C. received a check on the bank, drawn by B., it was held, that in an action by C. against B., on the check, the consideration for which the check was given might be inquired into. *The People v. Howell*, 296
13. If a check, given in payment of a preëxistent debt, proves bad, the party giving the check in payment, remains liable for the original debt. *ib.*
14. Where a check, purporting to be drawn by B., was presented by A., the agent of C., to the bank, and paid; but the bank, afterwards suspecting the check to be a forgery, stopped the money, *in transitu*, it was held, that B., admitting the check to be genuine, was not answerable to C. for the amount, the bank having acted without the direction or authority of B. *ib.*

for the recital of the register, was executed and delivered, and afterwards the blanks were filled up by the vendor and vendee; it was held, that the bill of sale was valid. *Woolley and others v. Constant*, 54

BOND.

1. Where A. gave a bond to B. conditioned to rebuild the walls of a certain house, in case they gave way or fell down in a certain time, and pay the damages; and the walls did give way within the time, and the obligee, having sold the house to C., assigned the bond to him, who gave notice to A. of the failure of the walls, and requested him to rebuild, &c., it was held, that the notice from the assignee was sufficient. *Van Vechten v. Graves*, 403
2. Where A., an insolvent debtor, petitioned for his discharge under the insolvent act, and on the day appointed to show cause, &c., B., one of the creditors, appeared and showed cause against the discharge; and it was then agreed between A. and B., that if the latter would withdraw all opposition to the discharge, &c., C. and D. should execute a bond to him, conditioned to deliver to him A.'s notes with approved endorsers, in 15 days after A.'s discharge; and the bond by C. and D. was accordingly executed and delivered to B. It was held, that the bond was illegal and void. *Bruce v. Lee and Mullikin*, 410
3. Where A. gave a bond with sureties to the *United States*, for duties, and A. was mentioned in the bond as the importer of the goods, and B., the surety, paid the bond; it was held, that he might maintain *assumpsit* against A., though in fact, a third person was the real owner of the goods. *Stuby v. Champlin*, 461

BILL OF SALE.

A bill of sale of a ship, containing blanks
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BURGLARY.

The breaking open, in the night time,

of a store, at the distance of 20 feet from a dwelling-house, but not connected with it, by any fence or enclosure, is not *burglary*. *The People v. Parker*, 424

C.

CANADA GRANTS.

1. This court will not take notice of claims to lands within this state, under grants made by the *French* government in *Canada*, prior to the treaty between *Great Britain* and *France*, in 1763; those claims being, at most, but equitable, and affording no evidence of a legal title that can be recognized by a court of law, which looks only to titles under patents from this state or the former colonial government of the province of *New-York*. *Jackson, ex dem. Winthrop, v. Ingraham*, 163
2. It seems, that those *Canadian* claims were pronounced by the colonial assembly of *New-York*, in 1773, to be wholly unfounded. *ib.*

CERTIORARI.

See PRACTICE, 6.

CHALLENGE OF JURORS.

A person indicted for forging an order for the payment of money, is not entitled to a peremptory challenge, it being an offence punishable by imprisonment for years only. *The People v. Howell*, 296

CHANCERY.

1. Where a suit at law was brought by A. against B., and they agreed to submit the same to the arbitration of persons mutually chosen, who decided in favor of A., it was

held, that it is not a sufficient ground for maintaining a bill in chancery, and continuing an injunction against proceeding at law; that A. was the agent of C., for whose use the suit was prosecuted, and against whom B. could make a good defence, for B. might make the same defence at law against A. as if the suit had been brought by C. *M Vickar and others v. Wolcott and others*, 510

2. Where a defendant neglects to set up matters in his defence at law, either before arbitrators or a jury, he cannot, afterwards, make such matter the basis of a suit in equity, unless there was some *accident* or *fraud* of which the party could not avail himself at law. *ib.*
3. A court of chancery will aid a defendant in obtaining a discovery, before a trial at law, but not afterwards. *ib.*
4. Where a court of chancery directs the conveyances made by a bankrupt to be set aside, as fraudulent, the property is not to be placed in the hands of a *master*, to be distributed; but is to be disposed of by the *assignee* of the bankrupt, according to the bankrupt law of the *United States*. *Sands and others v. Codwise and others*, 536

See CONTEMPT.

COMMISSION TO EXAMINE WITNESSES.

A return to a commission, in which it was stated that the witness was sworn and examined by virtue of the commission directed to commissioners by name, on interrogatories to him, administered by virtue of and under a commission, &c., and the names of the commissioners were subscribed, as such, to the deposition, it was held, that the commission was executed in due form, and that the deposition might be read. *Bolfe v. Van Rooten*, 130

COMMITMENT.

See CONTEMPT, 1. 3, 4.

CONSIDERATION.

1. A promise, without a consideration, though in writing, is a *nudum pactum*. *People v. Howell*, 296
2. A forbearance to sue generally, is a good consideration for a promise to pay the debt of another. *Elting v. Vanderlyn*, 237
3. A covenant of itself imports a consideration, and is not within the statute of frauds. *Livingston v. Tremper*, 416
4. A promise to pay the debt of a third person, though made on a sufficient consideration, must be in writing. *Simpson v. Patten*, 422

See AGREEMENT. ASSUMPSIT, 2. 4, 5.

CONSIGNOR AND CONSIGNEE.

See FACTOR.

CONTEMPT.

1. Where A. B., who was a master in chancery, was committed by the chancellor, and the order of commitment stated that A. B., while he was master, filed a bill to which he subscribed the name of C. D., one of the solicitors of the court, without his knowledge or consent, and prosecuted the cause in his name, "contrary to the statute in such case made and provided, in wilful violation of his duty as master, and in contempt of the authority of the court," and the said A. B. was ordered to be committed to gaol, "for the said malpractice and contempt, there to remain until the further order of the court;" it was held, that this was a legal and valid commitment for a contempt, even if the party might have been in-

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dicted for an offence against the statute, concerning counsellors, solicitors and attorneys. *In the case of J. V. N. Yates*, 317

2. But was this an indictable offence under the statute? *Quere.* *ib.*
3. This court has no power to discharge a person committed by the Court of Chancery for a contempt; and it will presume that the proceedings of that court were legal; and that the conviction for the contempt was on sufficient and legal evidence. *ib.*
4. A commitment for a contempt, "until the further order of the court," is good. *ib.*

COVENANT.

1. In an action for breach of the covenant of *seisin* and for *quiet enjoyment*, in a deed, the plaintiff can recover only the consideration money paid, with interest and the costs of ejectment. *Pitcher v. Livingston*, 1
2. He cannot recover damages for the *improvements* he has made, or the *increased value* of the land. *ib.*
3. In an action for a breach of the covenant of *seisin*, in a deed, brought by the *heirs* of the grantee against the grantor, it was held, that there being a failure of title, the covenant was broken as soon as it was made, and the grantee had an immediate and perfect right of action in his life-time, which went to his personal representatives on his death, and did not descend to his heirs, who could not, therefore, maintain the action. *Hamilton and others v. Wilson*, 72
4. A covenant of itself imports a consideration, and is not within the statute of frauds. *Livingston v. Tremper*, 416

COURTS OF COMMON PLEAS.

A court of common pleas may set aside a regular judgment, by default,

where there has been any fraud or surprise, especially in a bail-bond suit. *Delancy v. Brownell*, 136

COURT OF GENERAL SESSIONS OF THE PEACE.

In proceedings under the seventh section of the "act declaring the powers of the courts of general sessions of the peace," &c. the record of conviction ought to state sufficient to show that the justices had jurisdiction. The value of the thing stolen ought to be stated, and that the party convicted had not given bail, within 48 hours after being committed, or had consented to a trial before the expiration of that time. *Powers v. The People*, 292

COSTS.

1. Executors and administrators must pay costs on a judgment of nonsuit. *Executors of Cable v. Long*, 190
2. Costs of attendance of witnesses from another state, how taxed. *Howland v. Lenox and Maitland*, 311
3. Where an insolvent has assigned over all his estate for the benefit of his creditors, and a judgment was recovered in his name in the Court of Common Pleas for a less sum than 25 dollars, on which a writ of error was brought, the assignees, for whose benefit the suit was prosecuted, were ordered to give security for costs. *Ketcham and Blake v. Clark*, 484
4. On a motion to change the *venue*, no costs are allowed against either side. *Worthy v. Gilbert*, 492

D.

DEBTORS, INSOLVENT.

See INSOLVENT DEBTORS.
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DEED.

See GRANT.

1. A deed, after it has been executed, may be altered in a material part, with the consent of the parties, without affecting its validity. *Woolley and others v. Constant*, 54
2. The certificate of the proof or acknowledgment of a deed, taken before a judge, is not conclusive; but the party affected by the deed may contest its validity, and the force and effect of the formal proof. *Jackson, ex dem. Hardenbergh, v. Schoonmaker*, 161
3. A deed may in its operation be made to relate back to the time of the contract for the purchase of the land, as between the same parties, and for the furtherance of justice; but not so as to do wrong to strangers. *Jackson, ex dem. Griswold, v. Bard*, 230
4. Where G., by a writing under his hand and seal, gave to H. the privilege, during his pleasure, to occupy a certain piece of land, and H. afterwards sold the land to C., it was held that the instrument given by G. was a mere personal license or privilege to occupy, which was determined, as soon as H. undertook to convey the premises. *Jackson, ex dem. Hall, v. Babcock*, 418

DEVISE.

1. P. devised lands to his daughter C. "during the term of her life, and immediately after her death, unto and among all and every such child and children as the said C. shall have, lawfully begotten, at the time of her death, in fee simple, equally to be divided between them, share and share alike." It was held, that the four children of C., who were living at the time of the devise, and at the death of the testator, took a vested

- remainder in fee; and that in case there had been any children born afterwards, the estate would have opened for their benefit; and that the children of a daughter of C., who died in the life-time of her mother, were, therefore, entitled to the share of the daughter of C., who was living, at the death of the testator. *Doe, ex dem. Barnes and others, v. Provoost*, 61
2. A devise to a witness to a will is absolutely void. *Jackson, ex dem. Denniston, v. Denniston*, 311
6. A claim or title which could not be set up by a person, while in possession of land, cannot be set up by another person, who comes into possession of the land under him. *ib.*
7. Where A. went into possession of land under an agreement with B. for the purchase; and C. afterwards took possession under an agreement with A. for the purchase, the possession of C. was held not to be adverse to the title of B. *Jackson ex dem. Griswold, v. Bard*, 230
8. If a defendant in ejectment claims title, as tenant in common, he ought to enter into the common rule specially; otherwise, if he enters into the usual consent rule, he cannot object that no *actual ouster* was proved at the trial. *Jackson, ex dem. Denniston, v. Denniston*, 311
9. Neither a descent cast, nor the statute of limitations, will bar or affect the right of a remainder man or reversioner, during the continuance of the particular estates; nor will the acts or *laches* of the tenant in possession affect the party entitled in remainder. *Jackson, ex dem. Hardenbergh, v. Schoonmaker*, 390

DISCOVERY.

See CHANCERY, 3.

DISSEISIN.

See EJECTMENT, 11.

E.

EJECTMENT.

1. A lessor of the plaintiff in ejectment cannot be a witness in the cause. *Jackson, ex dem. Goodrich and others, v. Ogden*, 140
2. Evidence of the acts of the lessor, which tend to conclude him and those who derive title under him, is admissible. *ib.*
3. A person who has been in possession of land 8 or 10 years, under *color of title*, was held entitled to recover in ejectment against a mere intruder or trespasser. *Jackson, ex dem. Duncan and others, v. Harder*, 202
4. A mere intruder on land will not be allowed to protect himself in the possession, by setting up an outstanding title in a stranger. *ib.*
5. An outstanding title in a stranger cannot be set up, where there has been an adverse possession for 20 years. *ib.*
10. An entry, to avoid the statute, must be an entry for the purpose of taking possession. *ib.*
11. What acts amount to an adverse possession or disseisin. *ib.*
12. In ejectment, a person who has no claim, nor any subsisting title to the premises in question, cannot be made lessor. *Jackson, ex dem. Starr and wife, v. Richmond*, 483
13. In ejectment, where the tenant swears to merits, and no trial has been lost, a regular default will be set aside, to let in the tenant to defend his possession. *Jackson, ex dem. Mentz, v. Stiles*, 499
14. After a judgment by default, against the casual ejector, in ejectment, the landlord may be let in to appear and defend: and if he be an *alien*, he is, at the time when he is let in to defend, in season to

petition for the removal of his cause into the Court of the *United States*. *Jackson, ex dem. Cantine and others, v. Stiles*, 493

15. Where actions of ejectment, after judgment by default against the casual ejector, are removed into the Circuit Court of the *United States*, this court will order all further proceedings on such judgment to stay, until the further order of the court. *ib.*

See MORTGAGE, 2, 3.

ENTRY ON LAND.

1. Neither a descent cast, nor the statute of limitations, will bar or affect the right of a remainder-man or reversioner, during the continuance of the particular estate; nor will the acts or *laches* of the tenant of the particular estate, affect the party entitled in remainder. *Jackson, ex dem. Hardenbergh, v. Schoonmaker*, 390
2. An entry, to avoid the statute of limitations, must be an entry for the purpose of taking possession. *ib.*

ESCAPE.

Where a prisoner in execution, who has given security for the liberties, according to the statute, goes beyond the limits, and returns before an action brought, though the sheriff could not restrain him, and this is neither a negligent nor voluntary escape, yet the sheriff, under the statute, is liable to an action for an escape, in the first instance; and must look to the bail he has taken for his indemnity, the bond not having been made assignable. *Tillman v. Lansing*, 45

See SHERIFF, 3, 4.

EVIDENCE.

1. Evidence of the acts of the lessor of the plaintiff in ejectment, which tend to conclude him, and those who derive title under him, is admissible. *Jackson, ex dem. Goodrich and others, v. Ogden*, 140
2. The declarations of a person in the possession of land, as to his title, are admissible evidence against him and all persons claiming under him. *Jackson, ex dem. Griswold, v. Bard*, 230
3. Where no place is mentioned in a promissory note, at which it is to be paid, it *seems*, that parol evidence is admissible, to show at what place it was agreed that the note should be paid. *Thompson v. Ketcham*, 285
4. Where the witnesses to a bond are absent out of the state, proof of their hand-writing is sufficient, without proving the hand-writing of the obligor. *Sluby v. Champlin*, 461
5. Where a bond, with sureties, was given to the *United States* for duties, the possession of the bond and the collector's receipt, were held to be sufficient evidence of the payment by the surety. *ib.*

See WITNESS.

EXECUTION.

1. Lands mortgaged cannot be sold on an execution against the mortgagee, before a foreclosure of the equity of redemption, though the debt is due, and the estate of the mortgagee has become absolute at law. *Jackson, ex dem. Norton and Burt, v. Willard*, 41
2. Where a plaintiff has obtained a judgment, he may first issue a *fiery facias*, and if the whole debt is not levied on that execution, he may issue a *ca. sa.* or bring an action of debt on the judgment for the residue; and if a *non est inventus* is returned to such a *ca. sa.*, he

- may proceed against the bail. *Olcott v. Lilly*, 407
3. A *feri facias* cannot be levied after the return day thereof. *Vail v. Lewis and Livingston*, 450
 4. If a sheriff levy a *feri facias* after the return day, by the direction of the plaintiff's attorney, both he and the attorney are trespassers. *ib.*
 5. No action will lie against a plaintiff or his attorney, for neglecting to countermand an execution, after the return day. *ib.*

See SHERIFF, 1, 2, 3, 4. GAOL LIBERTIES, 1, 2.

EXECUTORS AND ADMINISTRATORS.

Executors and administrators must pay costs on a judgment of *non pros*. *Rudd and Everett, Executors of Cable, v. Long*, 190

F.

FACTOR.

1. Where A., of *Wilmington, North Carolina*, wrote to B., of *Liverpool*, enclosing an invoice and bill of lading of a cargo consigned to B., and informed him, that he had drawn bills to a certain amount, and B., in his answer, agreed to receive the consignment, and accept the bills; but, afterwards, refused to accept one of the bills, which was returned protested; it was held, that B. was answerable to A. for all the damages and costs, paid by him on the protested bill. *Urquhart v. M' Iver*, 103
2. A. consigned a vessel and cargo to B., at *Liverpool*, and advised him that he should make him secure for the acceptance of his bills, and sent him a power of attorney to sell the vessel, with directions to sell her in *England*; but if that could not be done, to procure a freight, or load her with as much salt as the funds of A. were equal to purchase, and send her to *New-York*; and B. loaded the vessel with coals; and having, under the power from A., executed a bill of sale of the vessel to C., of *New-York*, he sent the vessel and cargo to C., with directions to reconvey and deliver them to A., on his paying the balance due to B., for advances, otherwise, to sell them and place the proceeds to the credit of B., paying over the balance, which might remain, to A., who was also informed by B., of the transfer and consignment of the vessel and cargo to C. A. refused to accept the vessel and cargo from C., contending that B. had made the vessel his own. It was held, that B. not having followed the orders of A., in relation to the cargo, it belonged to B., and A. was not bound to accept it, nor liable to any charges attending it: that the vessel being intended as a security to B., he had a *lien* upon her for his advances, and that the assignment to C., being for the purpose of preserving that *lien*, and not an absolute sale, A. was bound to accept the vessel and pay the premium of insurance, and all the advances made by B. for repairs, &c. *Urquhart v. M' Iver*, 103
3. Though a factor cannot pledge the goods of his principal, as *his own*, yet he may deliver them to a third person, as security, with notice of his *lien*, and as his agent, to keep the possession for him, in order to preserve his *lien*. *ib.*

FEME COVERT.

A *feme covert*, who had executed a deed with her husband, was held to be a competent witness, to prove that the deed had been antedated

Jackson, ex dem. Griswold, v. Bard, 230

FENCE-VIEWERS.

1. How far the decision of the fence-viewers is conclusive? *Quere. Burger v. Kortright,* 414
2. It is enough, if any dispute exists about a partition fence, to enable the fence-viewers to interpose. *ib.*

FORCIBLE ENTRY AND DETAINER.

1. Where a justice proceeds under the third section of the "act to prevent forcible entries and detainers," it is not necessary that the justice should previously go in person to view and record the force. *The People, ex relat. Corless, v. Anthony,* 198
2. *It seems* that the traverse to an indictment for a forcible entry and detainer, need not be in writing. *ib.*
3. On an indictment for a forcible entry and detainer, the jury may find the defendant guilty of the detainer only. *ib.*
4. A *fine* is required to be imposed on the party, in a case of forcible entry and detainer, only where there is a conviction upon view, according to the first section of the act. *ib.*

FOREIGN LAWS.

Where a note was made in *Jamaica*, payable in *New-York*, it was held, that the contract was to be governed by the laws of *New-York*. *Thompson v. Ketcham,* 285

FRAUDS AND FRAUDULENT CONVEYANCES.

1. Where A. granted 86 acres of land

to B., reserving the streams of water and the soil under them, and the right of erecting mill-dams, and such part of the land as should be overflowed by water, for the use of the mills, for the grantor; it was held, that the right reserved by the grantor, being an incorporeal hereditament, must pass, by deed; at least, an assignment of it must be in *writing*, and a *parol* assignment would be void by the statute of frauds. *Thompson v. Gregory,* 81

2. A *covenant* to pay the debt of another is not within the statute of frauds, which does not apply to writings under seal. A *covenant*, of itself, imports a consideration. *Livingston v. Tremper,* 416
3. A promise to pay the debt of a third person, though made on a sufficient consideration, must be in writing. *Simpson v. Patten,* 422
4. What acts and circumstances of a fraudulent nature will avoid conveyances as against creditors. *Sands and others v. Codwise and others,* 536
5. Conveyances made to defeat creditors, are void by common law, as well as by the statute of frauds. *ib.*
6. Where deeds are void on the ground of absolute fraud, they are to be considered as void, *ab initio*; and are not allowed to stand as security to the grantee for any advances he may have made, or responsibilities he may have entered into, on account of them. *ib.*
7. Where the grantor of a deed made to defeat creditors, afterwards becomes a bankrupt, the grantee is accountable for the rents and profits subsequent to the act of bankruptcy, or from the time when the right of the creditors to call him to an account, accrued; and not before. *ib.*
8. Where a bill in chancery was filed by creditors, to set aside the deeds of a bankrupt, on the ground of fraud, it was held, that the property was not to be placed in the hands

of a master, to be distributed, but was to be disposed of by the assignees of the bankrupt, according to the bankrupt law of the United States *ib.*

G.

GAOL LIBERTIES.

- 1 A prisoner in execution, having given security for the liberties, resided, with his family, within the limits, and having afterwards obtained a writ of *supersedeas*, which was delivered to the sheriff, demanded his discharge, which was refused by the sheriff, unless his poundage fees were paid. He, afterwards, continued to reside within the limits for two or three months, and brought his action for false imprisonment, against the sheriff. It was held, that after the *supersedeas*, no formal discharge from the sheriff was necessary: and that the party having continued within the limits voluntarily, under a mistaken apprehension, that such a discharge was requisite, no action would lie against the sheriff. *Warne v. Constant, Sheriff, &c.* 32
2. Where a prisoner in execution, on giving security to the sheriff, was allowed the liberties of the gaol, and went beyond the limits on *Sundays*, returning again in the evening, it was held, that the sheriff had no power to restrain the prisoner, after he had given the security required by the statute; and though this was not a *voluntary* or *negligent* escape, yet it was such an escape under the statute relative to gaol liberties, as could not be purged by a voluntary return of the prisoner, before a suit brought, and rendered the sheriff liable in the first instance, who must resort to the bail for his indemnity, as the bond was not made assignable. *Tillman v. Lansing,* 45

GRANT.

1. Where A. granted 86 acres of land to B., reserving the streams of water, and the soil under them, with the right of erecting mill-dams, and all such part of the land as shall be overflowed by water, for the use of the mills for the grantor, and B. sold 40 acres of the premises to C., with the like exceptions, and C. erected a dam on his part of the land, by which the land of B. was overflowed; it was held, that until A. exercised his right and erected dams, the reservation was inoperative; if considered strictly as an exception, it would be void for uncertainty. *Thompson v. Gregory,* 81
2. B. may maintain an action on the case, against C. for erecting a dam so near the land of B. as to overflow it. *ib.*
3. The right reserved by A., being an incorporeal hereditament, could pass only by deed. *ib.*
4. A *parol* permission, given to C. by A. to erect the dam, was no defence against the action brought by B. for the assignment of such an interest, since the statute of frauds, must be in writing. *ib.*

H.

HABEAS CORPUS.

1. Where a sheriff returned to a writ of *habeas corpus*, that he held the prisoner by virtue of an order of the Court of Chancery, which order referred to a former writ of attachment, setting forth the grounds of commitment, and from which the prisoner had been discharged by a judge of this court in vacation, on another *habeas corpus*, and the sheriff also returned the attachment and proceedings prior to the last order of commitment: it was

- held, that the sheriff could not return the true cause of caption, without also stating the original attachment and subsequent orders, and that the whole return might be received and examined by the court. *In the case of John V. N. Yates*, 317
2. A discharge of a prisoner, committed by an order of the Court of Chancery, by a judge of this court, in vacation, on *habeas corpus*, is not conclusive, either on the Court of Chancery, or this court: and the prisoner may, after such discharge, be again committed for the same cause. *ib.*

HEIR.

See PLEAS AND PLEADINGS, 6.

HUSBAND AND WIFE.

See MARRIAGE.

I.

INDICTMENT.

1. Where a jury was sworn and empaneled, to try a prisoner on several indictments, after giving a verdict of not guilty on the first indictment, they separated and went to a tavern, and then returned into court, when the prisoner was tried by the same jury on the other indictment, the proceedings as to the other indictments were held irregular; but whether the prisoner is to be discharged, or a new trial granted? *Quere. The People v. Meany*, 294
2. A person indicted for forging "an order for the payment of money," is not entitled to a peremptory challenge, it being an offence punishable only by imprisonment for years. *The People v. Howell*, 296
3. In all cases where a right of peremptory challenge does not exist, two or more persons may be indicted and tried jointly, or separately, at the discretion of the court. *ib.*
4. Whether two persons indicted for a capital offence, and entitled to a peremptory challenge, can be tried together against their consent? *Quere. ib.*

INSOLVENT DEBTORS.

1. Where A., an insolvent debtor, petitioned for his discharge under the insolvent act, and on the day appointed for the creditors to show cause, &c. B., one of the creditors, appeared and showed cause against the discharge; and it was then agreed between A. and B. that if the latter would withdraw all opposition to the discharge, &c., C. and D. should execute a bond to B., conditioned to deliver him A.'s notes, with approved endorsements, in 15 days after A.'s discharge, payable in instalments, which bond was accordingly executed and delivered to B., who, afterwards, brought an action on the bond against C. and D. It was held, that the bond was illegal and void, as against the policy and intent of the insolvent act. *Bruce v. Lee and Mullikin*, 410
2. Where a suit was brought in the name of an insolvent, in a court of common pleas, but for the benefit of the assignees, and the plaintiff recovered less than 25 dollars; on bringing a writ of error to this court, the assignees were ordered to give security for the costs. *Ketcham and Blake v. Clark*, 484

INSURANCE.

1. Where a vessel was insured, and the policy contained a clause, "that if the vessel, upon a regular survey, should be declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting

her voyage, on account of her being unsound or rotten, the insurers should not be bound to pay," &c., and during the voyage, the vessel was surveyed and condemned, as not worth the expense of repairs, and the insured offered to abandon her for a total loss; it was held, that the survey was a necessary part of the preliminary proof, to be exhibited to the insurers, and ought to have been produced to them with the other documents, before the commencement of the action, or some account given why it was not produced. *Haff v. The Marine Insurance Company*, 132

2. A vessel was insured, "at and from Calcutta to New-York, with liberty to touch at Madras for trade, and to take in part of her cargo there." The vessel went to Madras, and sailed from thence direct for New-York, without ever going to Calcutta. In an action brought by the insured, to recover back the premium, it was held, that the voyage insured, did not commence; and that, as the policy did not attach, the insured was entitled to a return of the premium. *Murray v. The Columbian Insurance Company*, 443

INTEREST

1. Interest is allowable in an action of covenant for a certain sum due for rent, and payable in money. *Clark v. Barlow*, 183
2. Where a bill of exchange is drawn in England and payable there, the holder can recover here only five per cent. interest. *Foden and Slater v. Sharp*, 183

J.

JURY.

The affidavits of jurors cannot be received, to impeach their verdict; 490

but they may be received to exculpate the jurors, or in support of their verdict. *Dana v. Tucker*, 487

See INDICTMENT. SPECIAL JURY.

JUSTICE'S COURT.

1. Where a defendant was summoned to appear before a justice, on a certain day, at a certain place, and the parties appeared at the time and place, but the justice did not attend, and sent a written note, adjourning the cause to a future day, on which day he attended with the plaintiff, and the defendant not appearing, the cause was heard on the part of the plaintiff, and judgment given in his favor; It was held, that the adjournment was irregular, and the defendant was not bound to attend further, and that the subsequent proceedings by the justice were null and void. *Wiest v. Critsinger*, 117
2. Where a justice issued a warrant against two defendants, one of whom was taken, and the other not found, and the defendant taken pleaded to the action, and a venire was issued which named him alone, without taking notice of the other defendant, it was held sufficient. The statute merely requires that the judgment should be against the joint debtors, but is silent as to the intermediate proceedings. *Hutchins and Cary v. Fitch*, 222
3. A justice cannot permit a party to appear by attorney, from his own knowledge of the fact, that the party is absent at the time, and out of the county. He must have proof of the fact. *Rosekrans v. Van Antwerp*, 228
4. Where the jury, in an action before a justice, gave a verdict for the defendant for 25 cents, and the defendant remitted the damages, and the justice entered the remittitur, and gave judgment generally

- for the defendant, it was held to be correct. *Burger v. Kortright*, 414
5. A judgment entered by a justice, on the confession of the party for such sum as A. and B. should award, made before the award was declared, is bad. A confession of judgment must be for a sum certain. *Nichols v. Hewitt*, 423

See PRACTICE, 6.

L.

LANDLORD AND TENANT.

- Where a tenant holds over the term, and the landlord enters *by force*, and turns him out, he cannot maintain *trespass* against the landlord. *Hyatt v. Wood*, 150
2. Where A., having been in possession of land about ten years, afterwards, on the 7th of *November*, sold all his right, interest and improvements to B., and promised to deliver the possession to him on the 1st of *March* following, and acknowledged that he held the possession of the land under B.; it was held that A. was the tenant of B. and having continued in possession after the 1st of *March*, he became a tenant at sufferance; and that the entry of B., afterwards, put an end to the tenancy; so that B. might maintain trespass against a person claiming to hold under A. *Wood v. Hyatt*, 313
- Such a title in B. is sufficient against all but the rightful owner. *ib.*

LETTER OF CREDIT.

- Where A. gave a letter of credit to B. for goods to the amount of 800 dollars, addressed to C., who delivered to B. part of the goods, and the residue was delivered to him by D. and E., on the same letter of credit; in an action brought by C. against A. for the whole, it was held, that

he was responsible only for the goods delivered by C., such a letter of credit not being assignable. *Robbins v. Bingham*, 476

LIEN.

See FACTOR, 2, 3.

LIMITATION OF ACTIONS.

- If the defendant, on being arrested by the sheriff, promises to settle with the plaintiff, if he will give time for payment, it is a sufficient acknowledgment, to prevent the operation of the statute of limitations. *Sluby v. Champlin*, 461

M.

MARRIAGE.

1. An actual marriage may be inferred, in ordinary cases, from cohabitation, acknowledgment of the parties, &c. No formal solemnization of marriage is required. *Fenton v. Reed*, 52
2. A contract of marriage made *per verba de presenti* is as valid, as if made *in facie ecclesiæ*. *ib.*

MORTGAGE.

1. The interest of a mortgagee cannot be sold on an execution, before a foreclosure of the equity of redemption, though the estate of the mortgage may have become absolute at law. *Jackson, ex dem. Norton and Burt, v. Willard*, 41
2. Where a lease was assigned, and by a bond executed at the same time the assignment was declared to be made to secure a debt due to the assignee, and an agreement to re-assign the lease and premises on payment of the money and interest;

it was held to be a mortgage, and that the mortgagor was entitled to a notice to quit, before bringing an action of ejectment against him. *Jackson, ex dem. Carr, v. Green,* 186

3. No notice to quit is necessary previous to bringing an action of ejectment by a mortgagee against a purchaser of the interest of the mortgagor, or against a third person, between whom and the mortgagee there is no privity of contract or estate. *Jackson, ex dem. Ferris, v. Fuller,* 215
4. Though the interest of a mortgagee cannot be sold on execution, yet he may maintain an action of ejectment against the mortgagor, and those who claim under him. *Jackson, ex dem. Tuthill, v. Dubois,* 216
5. A mortgage not registered has a preference over a subsequent judgment docketed; but if the land should be sold by the sheriff on an execution, under the judgment, prior to the registry of the mortgage, a *bona fide* purchaser, at the sheriff's sale, would be protected against the mortgage. *ib.*
6. Where A. mortgaged land, in 1800, and a judgment was obtained against him and docketed in 1801, and the mortgage was afterwards registered in 1802, and the land having been seized under an execution issued on the judgment, the mortgagee attended at the sheriff's sales, in 1806, and bid, without mentioning his mortgage; it was held that the registry of the mortgage was notice to all the world, and that the interest of the mortgagee was not affected by his silence or bidding at the sheriff's sale, nor could it be defeated by the sale under the judgment, subsequent to the registry. *ib.*

N.

NEW TRIAL.

1. A new trial will not be granted, on 492

the discovery of new evidence which would merely impeach the character of a witness at the trial. *Shamway v. Fowler,* 425

2. A new trial will not be granted, on the account of newly discovered evidence, where the affidavit states only that a person had *told* the party what he would say. *ib.*

NONFEASANCE.

See ACTION ON THE CASE. 2

NOTICE.

See BOND.

NOTICE TO QUIT.

See MORTGAGE, 2, 3.

O.

ONONDAGA COMMISSIONERS

Where the heirs of N., a native of *Ireland*, and living in *Ireland*, neglected to enter their dissent to the award of the *Onondaga* commissioners, in relation to a lot of land of which N. died seised, within the two years limited by the act, they were held for ever barred and concluded by the award, except L., who was a *feme covert*, and within the saving of the act, there being no saving on account of *absence* from the state. *Jackson, ex dem. Folliard and Wallace, v. Wright,* 75

P.

PARTNERSHIP

1. One partner, after a dissolution of the co-partnership, cannot endorse notes or bills given before to the firm, though he is authorized to

- settle the copartnership concerns. *Sanford v. Mickles and Forman*, 224
2. In 1803, A. and B. entered into partnership, as sugar-refiners, and published in two of the gazettes printed in the city of *New-York*, (and which were taken by C.,) that they had so entered into partnership in the sugar-refining business, under the firm of A. & Co. In *April*, 1805, B., without the knowledge or consent of A., purchased a quantity of brandy of C., for which he gave his individual note, payable to the firm, and endorsed by him with the name of the firm. The bill of parcels, by direction of B., was made out in his name only, and the brandy was shipped to the *West Indies* in a vessel belonging to him, and on his own account; and C., in order to obtain the drawback, made oath at the custom-house that the brandy was sold to B. A. and B. had entered the name of their firm in two of the banks in the city of *New-York*, and B. drew checks and made and endorsed notes in the name of the firm, which were regularly received and paid, the banks supposing them to be general partners. C. when he sold the brandy, required the partnership security, and it did not appear that he knew of the limited nature of the partnership, until after its dissolution in *June*, 1805, notice of which was published in two of the newspapers. It was held that the copartnership were not liable on the note. *Livingston v. Roosevelt and another*, 251
 3. Where a person takes a partnership security from one of several partners, for what is known, at the time, to be a particular debt of the partner giving the security, the copartnership is not liable. *ib.*
 4. Where there is a special or limited partnership, in any particular trade or business, one partner cannot bind his copartner, by any contract not connected with such trade or business; and a knowledge in third persons of the limited nature of the partnership will be inferred from circumstances. *ib.*
 5. *It seems*, that a publication in the gazette, of the nature of a copartnership, at the time of its commencement, is constructive notice to all those who may, afterwards, take the partnership security. *ib.*
 6. A partnership may exist between attorneys and counsellors at law. *In the matter of Woodward*, 280

PARTITION OF LAND.

- A *parol* partition of land, carried into effect, by possession taken by each party of his respective share, according to the partition, will be valid and binding on the parties. *Jackson, ex dem. Duncan and others, v. Harder*, 202

PLEAS AND PLEADINGS.

1. If the defendant, in an action of trespass *quare clausum fregit*, pleads *liberum tenementum*, the plaintiff cannot reply *de injuria sua propria*, but must traverse the title; but if the defence is set up by way of excuse, and not in justification, then the plaintiff may reply *de injuria sua propria*. *Hyatt v. Wood*, 150
2. In an action of debt on a bond for the performance of a covenant, or with a condition to convey land, the plaintiff must assign breaches, and have his damages assessed by a jury. If he takes issue generally on the plea of performance, and a jury find a verdict for 6 cents damages, and he enters judgment for the penalty, he cannot issue execution for the penalty. *Caverly v. Nichols*, 189
3. In suits on bonds for the performance of covenants, it is compulsory on the plaintiff to assign breaches, and have his damages assessed, and if no damages are assessed on

- the breaches assigned, it will be error. *Van Benthuysen and another, v. De Witt and others*, 213
4. Where a suit was brought on a note to A. or bearer, and the defendant pleaded a former suit on the same note against him by H., and a judgment in favor of the defendant, it was held not to be a bar to the second suit, unless the defendant also proved that A. was the rightful owner or possessor of the note. *Hutchins and Cary v. Fitch*, 222
 5. A declaration on a promise to pay the debt of another need not state, that the promise was in writing. That is matter of evidence at the trial; and after a verdict, the court will presume that it was proved to be in writing. *Elting v. Vanderlyn*, 237
 6. Where one of several heirs is sued on his promise to pay the debt of his ancestor, the plaintiff need not allege in his declaration, that the defendant or the heirs had assets. *ib.*
 7. In an action brought against A., on his guaranty of the performance by B. of his agreement made with C., it was held that the declaration ought to state a consideration for the undertaking of A. *Bailey and Bagert v. Freeman*, 280
 8. Several of the common counts on different contracts may be included in one count; and the plaintiff is not bound to prove all the causes of action stated, in order to entitle him to recover. It is enough if he proves any one of the causes of action, and he will recover *pro tanto*. *ib.*
 9. Where a clause or section of a statute giving an action for any offence, contains a *proviso* or *exception*, which is against the plaintiff, or is matter of defence or justification, for the defendant, the plaintiff need not negative the proviso in his declaration. *Teel v. Fonda*, 304
 10. Where the time laid in a declaration under a *scilicet* is material, 494

and the *gist* of the action, it shall be taken to be the true time, and the *scilicet*, if repugnant, is to be rejected as void, or if consistent, is to be held as a direct affirmation. *Vail v. Lewis and Livingston*, 450

POSSESSION OF LAND.

Where A. went into the possession of land under an agreement made with B. for the purchase; and C. afterwards took possession under an agreement with A. for the purchase, the possession of C. was held not to be *adverse* to the title of B. *Jackson, ex dem. Griswold, v. Bard*, 230

See EJECTMENT, 3, 4, 5, 6, 7. TRESPASS QUARE CLAUSUM FREGIT.

PRACTICE.

1. A motion to set aside a verdict for irregularity, and also on the merits, is an enumerated motion. *Foden and Slater v. Sharp*, 183
2. Where bail was put in, and the plaintiff entered an exception on the bail-piece, and afterwards proceeded in the cause, without any justification of bail, and obtained a judgment, it was held to amount to a waiver of the bail; and that he could not proceed against the bail to whom he had excepted. *Flack v. Eager*, 185
3. No formal notice of a waiver of bail is necessary. *ib.*
4. Where the subject matter of a libel related to a remote transaction, and though concerning the conduct of a foreign minister resident here, but who had long since been superseded, a struck jury was refused. *Genet v. Mitchell*, 186
5. Where a lease was assigned, and by a bond executed at the same time, the assignment was declared to be made to secure a debt, it was held to be a mortgage, and the

- mortgagor entitled to a notice to quit. *Jackson, ex dem. Carr, v. Green*, 186
8. Where a judgment was obtained in the Justices' Court in *New-York*, on which a *certiorari* was brought to this court, and the defendant, being taken on a *ca. sa.* in the court below, paid the money into that court, and was discharged; and afterwards, the judgment below, being affirmed in this court, the attorney for the defendant in error issued a *ca. sa.* on the judgment in this court, against the plaintiff in error, for the amount of the damages and costs recovered in the court below, and the costs in error, which were paid to the sheriff; this court ordered the money to be refunded, with costs to be paid by the attorney, and a satisfaction to be endorsed on the *ca. sa.* *Hoyt v. Peterson*, 188
7. In an action of debt on a bond, conditioned to convey land, &c., the defendant pleaded performance, and the plaintiff replied generally, that the defendant did not perform; and the jury found a verdict for the plaintiff for six cents damages and six cents costs, and the plaintiff entered up judgment and issued execution for the penalty in the bond, the court set aside the execution with costs. The plaintiff ought to have assigned breaches, and had his damages assessed by the jury. *Caverly v. Nichols and Brown*, 189
8. Pledges of prosecution to a declaration are mere form, and may be added any time before judgment. *Baker and others v. Philips*, 190
9. Where the defendant, in a suit in a court of common pleas, obtained his discharge under the insolvent act, on the same day that a judgment was rendered against him, in that court, and being brought up on a *ca. sa.* the Court of Common Pleas discharged him, it was held to be regular. A party entitled to relief by an *audita querela*, may be relieved on motion. *Baker v. The Judges of Ulster*, 191
10. In suits on bonds for the performance of covenants, it is compulsory on the plaintiff to assign breaches, and have his damages assessed; and if no damages are assessed on the breaches assigned, it will be error. *Van Benthuysen v. De Witt and others*, 213
11. What is a sufficient affidavit of a cause of action, on a motion to discharge a defendant, on common bail. *Watkinson v. Laughton*, 307
12. In an action of *dower*, it is a matter of course, after the demandant has counted, to grant the defendant a special imparlance to the next term. *Haviland v. Bond*, 309
13. On a motion to set aside a nonsuit, the court will not take notice of objections to the sufficiency of the declaration: they properly arise on a motion in arrest of judgment. *Van Vechten v. Graves*, 403
14. After the return of a *ca. sa.* against the principal, and the bail has become fixed, the court will not relieve the bail, when the principal is dead. *Olcott v. Lilly*, 407
15. The court affords relief to bail, only to enable them to surrender the principal; and where the principal is convicted of felony, sent abroad as an alien, or discharged under the bankrupt or insolvent laws, it is regarded as equivalent to a surrender. *ib.*
16. Where a plaintiff has obtained a judgment, he may first issue a *fi. fa.* and if the whole of the debt is not levied under that execution, he may then issue a *ca. sa.* or bring an action of debt on the judgment for the residue; and if a *non est inventus* is returned on such a *ca. sa.* he may then proceed against the bail. *ib.*
17. A confession of judgment must be for a certain specific sum. *Nichols v. Hewitt*, 423
18. A new trial will not be granted on an affidavit of newly discovered evi-

- dence, which states only, that a person *told* the party what he would say, nor to impeach the character of a witness at the trial. *Shumway v. Fowler*, 425
19. Where bail have been lulled into security by the plaintiff, and are taken by surprise, the court will relieve them, by allowing a surrender, though more than eight days have elapsed in full term, after the return of the *capias* against the bail. *Livingston v. Bartles*, 478
 20. On a motion to change the *venue* on account of material witnesses residing in another county, the defendant ought to state the number of his witnesses, otherwise the court cannot intend that he has more than one. *Minor v. Garrison and Baker*, 481
 21. Where a representative in Congress is libelled, in respect to his official conduct, a special jury may be awarded. *Thomas v. Rumsey*, 482
 22. In ejectment, a person who has no claim or any subsisting title to the premises in question, cannot be made lessor. *Jackson, ex dem. Starr and wife, v. Richmond*, 483
 23. Where an *ac etiam* clause in *assumpsit* was inserted in a *capias*, and the plaintiff afterwards declared in *account*, the proceedings were set aside for irregularity. *Rogers v. Rogers*, 485
 24. Where the defendant is held to bail by an *ac etiam* clause in a *capias*, the plaintiff is bound to pursue the nature of the action so stated in the writ, or an *exoneretur* may be ordered to be entered in the bail-piece. *ib.*
 25. *It seems*, that where a sheriff is plaintiff, he may serve his own writ. *Bennet v. Fuller*, 486
 26. Where the defendant, in such case, was under a mistake as to the arrest, a default entered for want of a plea, was set aside, on an affidavit of merits. *ib.*
 27. The affidavits of jurors cannot be received to impeach their verdict; but they may be received to exculpate the jurors, or in support of their verdict. *Dana v. Tucker*, 487
 28. In an action of ejectment, where the tenant swears to merits, and no trial has been lost, a regular default will be set aside, to let in the tenant to defend his possession. *Jackson, ex dem. Mentz, v. Stiles*, 489
 29. A special jury will not be allowed, in an action for a libel on a person who is a public officer, unless the libel relates to his official conduct. *Thomas v. Croswell*, 491
 30. Where the plaintiff undertook to bear all the expenses of bringing the defendant's witnesses to the place where the *venue* was laid, a motion to change the *venue* was denied. *Worthy v. Gilbert*, 492
 31. On a motion to change the *venue*, no costs are allowed on either side. *ib.*
 32. After a judgment by default against the casual ejector in ejectment, the landlord will be let in to appear and defend; and if he be an *alien*, he is, at the time when he is let in to defend, in season to petition the court for the removal of his cause to the Court of the *United States*. *Jackson, ex dem. Cantine and others, v. Stiles*, 493
 33. Where actions of ejectment, after a judgment against the casual ejector, are removed into the Circuit Court of the *United States*, this court will order all further proceedings on such judgment to be stayed, until the further order of the court. *ib.*

See BAIL. EJECTMENT.

PRACTICE IN THE COURT OF ERRORS.

1. After an assignment of errors, and joinder thereon, this court will not send the transcript of the record back to the Supreme Court to be amended, by the record in that court, which had been amended by

that court, since the joinder in error in the Court of Errors. *Cheetham v. Tillotson*, 499

- 2 All defects, or errors properly amendable, may be amended in the Court of Errors, who will disregard all defects or errors in matters of form which may be amended, or which are cured by the statute of *jeofails*. *ib.*
3. If a party wishes to have a transcript amended, the proper course is to allege diminution, and pray a *certiorari* to the court below. *ib.*
4. After the defendant in error has pleaded in *nullo est erratum*, he cannot allege diminution, for by his plea he admits the record to be perfect; so that after a joinder in error, neither party can allege diminution, or pray a *certiorari*. *ib.*
- 5 An appeal lies to this court from an order of the Court of Chancery, for continuing an injunction and awarding costs against the defendant. *M' Vickar and others v. Wolcott and others*, 510
6. Where a bill in chancery was filed by creditors to set aside the deeds of a bankrupt, on the ground of fraud, it was held, that the property was not to be placed in the hands of a *master*, to be distributed; but was to be disposed of by the *assignees* of the bankrupt, according to the bankrupt law of the *United States*. *Sands and others v. Codwise and others*, 536
7. On an appeal, this court will decide on those parts only of the decree of the court below, which are complained of in the petition of appeal. *ib.*

R.

REMAINDER AND REVERSION.

1. The right of a remainder-man or reversioner will not be barred or taken away by a descent cast, or the statute of limitations, during

the continuance of the particular estate. *Jackson, ex dem. Hardenbergh, v. Schoonmaker*, 390

2. The acts or *laches* of the tenant of the particular estate, will not affect the party entitled in remainder. *ib.*

See DEVISE

RESERVATION

See GRANT.

S.

SALE.

- A. sold to B. a quantity of paints for good *Spanish brown* and *white lead*, and for a full price; the paints proved to be bad, and of no value. It was held, there was no warranty in the case, and to make A. liable, there must be either an express warranty or fraud. *Holden v. Dakin*, 421

See TROVER. BILL OF SALE.

SHERIFF.

1. A sheriff has no authority to act under a *f. fa.* after the return day thereof. *Vail v. Lewis and Livingston*, 450
2. If a sheriff levy a *feri facias*, after the return has expired, by the direction of the plaintiff's attorney, he and the attorney are both trespassers. *ib.*
3. If a new sheriff receives a prisoner from his predecessor, he is answerable for his escape, though a voluntary escape may have existed in the time of his predecessor. *Rawson v. Turner*, 469
4. But the plaintiff has his election either to consider the prisoner in execution, and so charge the new sheriff for the last escape, or as out

497

of execution, and charge the old sheriff. *ib.*

5. If the plaintiff has once made his election and sued the old sheriff, and recovered judgment against him, it is conclusive, and a bar to any action against the new sheriff. *ib.*

6. *It seems*, that where a sheriff is plaintiff in a cause, he may serve his own writ. *Bennet v. Fuller*, 496

See GAOL LIBERTIES, 1, 2. EXECUTION.

SPECIAL JURY.

1. Where a representative in Congress is libelled in respect to his official conduct, a special jury may be awarded. *Thomas v. Rumsey*, 483
2. A special jury will not be allowed in an action for a libel on a public officer, unless the libel relates to his *official* conduct. 491

STATUTE OF FRAUDS.

See FRAUD AND FRAUDULENT CONVEYANCES.

SUPERSEDEAS.

After a *supersedeas* to a *ca. sa.*, the prisoner in execution need not have a formal discharge from the sheriff; and if he stays within the limits, because the sheriff refused to give him a discharge, he cannot maintain an action for false imprisonment against the sheriff. *Warne v. Constant*, 32

See GAOL LIBERTIES.

T.

TENANT.

See LANDLORD AND TENANT. 498

TIME.

Where the time laid in a declaration under a *sciñcet* is material, and the *gist* of the action, it shall be taken to be the true time, and the *sciñcet*, if repugnant, is to be rejected as void. *Vail v. Lewis and Livingston*, 450

TREATY BETWEEN GREAT BRITAIN AND FRANCE, IN 1763.

See CANADA GRANTS.

TREATY OF 1794, BETWEEN GREAT BRITAIN AND THE UNITED STATES.

By the 9th article of this treaty, *British* subjects and their heirs, though *aliens*, may hold lands in this state; and an act of the legislature, vesting the lands of which a native of *Ireland* died seised, in this state, in one of his heirs, in exclusion of the rest, was held inoperative. *Jackson, ex dem. Folliard and Wallace, v. Wright*, 75

TRESPASS.

An action of *trespas*, and not an action on the *case*, lies against a sheriff who serves an execution after it has expired. *Vail v. Lewis and Livingston*, 450

TRESPASS QUARE CLAUSUM FREGIT.

1. If a person, having a *possessory* title to land, enters *by force*, and turns out a person who has a naked possession only, the latter cannot maintain trespass against the person so entering under color of title. *Hyatt v. Wood*, 150.
2. If a person, having a legal right

- of entry on land, enters *by force*, though he may be indicted for a breach of the peace, yet he is not liable to a private action of trespass, at the suit of the person who has no right, and is turned out of possession. *ib.*
- 3 Where a tenant holds over the term, and the landlord enters *by force*, and turns him out, he cannot maintain trespass against the landlord. *ib.*
4. If the defendant, in an action of *trespass quare clausum fregit*, pleads *liberum tenementum*, the plaintiff cannot reply *de injuria sua propria*, but must traverse the title; otherwise, where the defence is set up by way of excuse, and not in justification. *ib.*
5. Where A., having been in possession of land about ten years, afterwards, on the 7th of *November*, sold all his right, interest, and improvements to B., and promised to deliver up the possession on the 1st day of *March* following, and acknowledged that he held possession under B., it was held, that A. was the tenant of B., and having continued in possession after the 1st of *March*, he became a tenant at sufferance, and that by the entry of B., an end was put to the tenancy, so that B. might maintain trespass *quare clausum fregit*, against one claiming to hold under A. *Wood v. Hyatt*, 313
- 6 Such a title in B. is sufficient to support the plea of *liberum tenementum*, in an action of trespass against him. *ib.*

TROVER.

An *American* ship was captured by a *French* privateer, and carried into *Porto Rico*, a *Spanish* port, and from thence to *Samana*, where she was put in requisition by the *French* government, and sent to *Barracoa*, where she was dismantled and abandoned. The vessel having

stranded on the beach, was, some months after, sold at auction by the commanding officer of the port, and purchased by an *American*, who, afterwards, repaired her at a great expense, and brought her to *New-York*, where she was claimed by the original owner. In an action of *trover*, brought by the original owner, it was held, that the vessel being abandoned and a wreck, and having been sold by the government of *Barracoa*, according to the laws of *Spain*, in cases of wreck or derelict, the property was transferred by the sale to the purchaser, who, thereby, acquired a valid title against all the world. *Grant and Swift v. M'Lachlin*, 34

TRUSTEES.

Where two trustees for the sale of an estate, joined in a conveyance, and both acknowledged the receipt of the consideration money, but the money went into the hands of one of the trustees only; it was held, that the other was not answerable for the money so received by his co-trustee, and misapplied. *Kip's Adm'rs. v. Deniston*, 23

V.

VENUE.

See PRACTICE, 10. 30, 31

VERDICT

See JURY

W.

WAGER.

An action for a wager is maintainable at the common law; but a wager

which is against the principles of sound policy, &c. is void, and cannot be recovered. *Bunn v. Riker*, 426

WILL.

See DEVISE.

WITNESS.

- 1 D. and M. being indebted to C., he attached money in the hands of B., at *New Orleans*, belonging to M. In an action brought by C. against B., for the money so attached and held by him to answer to C., it was held, that D. was a competent witness for the plaintiff; for though the recovery of the plaintiff would go so far in discharge of the debt due by the witness, yet he would be liable over for the same amount to M., so that his interest was balanced between the parties. *McLeod v. Johnston*, 126
2. Whether M. is a competent witness, in such a case, for the plaintiff? *Quere.* *ib.*
3. A lessor of the plaintiff in ejectment cannot be a witness in the cause; if his name is used without his consent, it may be struck out of the declaration, on application to the court. *Jackson, ex dem. Goodrich and others, v. Ogden*, 140
4. A *feme covert*, who has executed a deed with her husband, was held a competent witness to prove that

the deed had been antedated. *Jackson, ex dem. Griswold, v. Bard*, 230

5. Where a witness is interested in any part of the demand of the plaintiff, he cannot be admitted as a witness to another part. *Gage v. Stewart*, 293
6. A check in the name of B., on the bank, was passed by C. to D., who received the money and remitted it to C. as his agent. The check was afterwards discovered to be a forgery, and the bank got possession of the money remitted by D., before it reached the hands of C. On an indictment of C. for forgery, B., whose name was forged, was held to be a competent witness to prove the forgery, having received a release from the bank. *The People v. Howell*, 296
7. Whether, in every criminal case, a witness, who is not interested in the event of the cause, is not a competent witness? *Quere.* *ib.*

WRECK

Where a vessel was abandoned and a wreck in a foreign port, and was sold by the government of the place, according to the laws of the country, in cases of wreck or derelict, and was purchased by an *American*; it was held, that the purchaser acquires a valid title against all the world, and was not liable to an action of trover by the original owner. *Grant and Swift v. McLachlin*, 34



